

# Preemption in Congress

GARRICK B. PURSLEY\*

*Modern preemption is about more than courts following the Supremacy Clause's command to apply federal law rather than state law where the two conflict. More and more, preemption is about courts enforcing Congress's intent that there should be no state law on a subject, even where there is no conflicting substantive provision of federal law. Courts assume that this is a legitimate exercise of congressional power and confine their efforts to determining the categories of state law Congress intended to displace. Even as they bemoan the increasing frequency of preemption and its effects on state governments, commentators make the same assumption and limit their suggestions to fine-tuning the judicial method for determining the extent of Congress's preemptive intent.*

*My approach is different. Rather than take for granted Congress's power to displace state law in the absence of conflicting federal law, I examine the potential constitutional sources of that power. It simply will not do, after all, to have the government exercising power of uncertain constitutional origin to such profound effect. Judicial decisions that defer the question to Congress offer little guidance, so I suggest shifting the focus to Congress itself and lay out a method for discovering Congress's views on the matter. After discussing the kinds of evidence that might legitimately disclose Congress's understanding of the constitutional basis and scope of its preemptive authority, I begin a descriptive account of Congress's understanding by looking at one category of relevant statutory evidence and sketching future research.*

*We cannot assess the legitimacy of judicial preemption doctrine without a better account of the constitutional norms the doctrine is supposed to implement. In its deferential posture on the basic question of legislative power, preemption doctrine resembles the approach courts take to the scope of Congress's commerce power and other basic questions of the constitutional permissibility of national legislation. The methodology I map here for assessing Congress's engagement with these important constitutional questions may provide a new approach to understanding and critically evaluating government compliance with fundamental legal norms.*

---

\* Assistant Professor, The University of Texas School of Law. I thank Dean Lawrence Sager, Professors Mitchell Berman, Lynn Blais, Jane Cohen, Ian Farrell, William Forbath, Brian Galle, Dan Rodriguez, Jordan Steiker, Ernest Young, Hannah Wiseman, and all the participants in The University of Texas School of Law's faculty colloquium for helpful comments and suggestions. As always, I'm grateful to Amber Pursley for care and support.

## TABLE OF CONTENTS

I. INTRODUCTION .....	512
II. THE CONCEPTUAL GAP IN JUDICIAL PREEMPTION DOCTRINE .....	520
A. <i>Clear Cases Versus Indirect Conflicts</i> .....	524
B. <i>Effects on State Law</i> .....	526
C. <i>Judicial Underenforcement of Preemption's Authorizing Norm</i> .....	530
III. CONGRESS'S CAPACITY FOR CONSTITUTIONAL DELIBERATION AND DECISIONMAKING .....	534
A. <i>The Relevant Questions About Institutional Capacity</i> .....	535
B. <i>Bare Congressional Capacity</i> .....	544
1. <i>The Strong Realist Critique</i> .....	549
2. <i>The Weak Realist Critique</i> .....	553
3. <i>Strategic Argument and the Institutional View</i> .....	560
C. <i>Practical Obstacles and Aids</i> .....	563
IV. EVIDENCE OF CONGRESS'S VIEW OF THE CONSTITUTIONAL NORMS GOVERNING PREEMPTION .....	576
A. <i>Kinds of Evidence</i> .....	578
B. <i>Statutory Evidence: Frameworks</i> .....	588
C. <i>Implication, Open Questions, and a Research Agenda</i> .....	604
V. CONCLUSION .....	609

## I. INTRODUCTION

Most debates about preemption relate to what *courts* do in preemption cases. Conventional wisdom has it that the Supremacy Clause mandates the displacement of state law or state regulatory authority wherever Congress so intends. On this account, courts in preemption cases really just have to figure out what, exactly, Congress intended to preempt. Yes, preemption decisions involve a number of judge-made doctrinal tools—for determining the existence of implied preemption, conflicts with federal statutory objectives, or federal takeover of an entire “field” of regulation—which, in their plasticity, often make it seem as though preemption is more a matter of judicial discretion than congressional prerogative. But these doctrines are designed to identify and implement congressional intent; indeed, on the standard view that Congress possesses primary authority to preempt state law, these doctrines’ legitimacy depends on their validity as proxies for Congress’s preemptive intent. Preemption’s effects are often striking—nullifying validly enacted state laws and preexisting state regulatory authority are the kinds of things that intuition tells us require substantial

constitutional justification. But while judicial preemption doctrine, at bottom, entirely abdicates to the Congress the authority to determine when these extreme moves are constitutionally permissible; Congress's views about the constitutional permissibility of preemption have been largely ignored. In this article, I want to start filling this gap by laying some theoretical groundwork and giving the beginnings of an account of congressional views about the constitutional norms governing preemption.

Preemption is enormously significant. Current preemption doctrine allows Congress to affirmatively invalidate categories of state law and prospectively close off state regulatory authority with nothing more than a clear showing of its intent to do those things. No conflict with a substantive provision of federal law is required. Thus preemption may be the most important issue for modern federalism theory because it reallocates regulatory authority between the national and state governments. Constricting state regulatory authority reduces states' capacity to provide benefits to their citizens, which in turn diminishes states' effectiveness at checking national expansionism in the political process—a critical prerequisite for a functioning set of “political process” safeguards for federalism.<sup>1</sup> Preemption also shapes the regulatory environment for most major industries—drugs and medical devices, tobacco, banking, air transportation, securities, cars, and boats; to name a few.<sup>2</sup> And, since

---

<sup>1</sup> See generally Ernest A. Young, *Federal Preemption and State Autonomy* [hereinafter Young, *Federal Preemption*], in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS 251–52 (Richard A. Epstein & Michael S. Greve eds. 2007) [hereinafter FEDERAL PREEMPTION]; Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008) [hereinafter Young, *Executive Preemption*]; Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733, 1848 (2005) [hereinafter Young, *Federalism Doctrine*]; Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 130–34 (2004) [hereinafter Young, *Federalisms*]; Ernest A. Young, *Two Cheers for Process Federalism*, 46 VILL. L. REV. 1349, 1368–73 (2001) [hereinafter Young, *Two Cheers*].

<sup>2</sup> On drugs and medical devices, see, e.g., *Wyeth v. Levine*, 129 S. Ct. 1187 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341 (2001); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996); see also Daniel E. Troy, *The Case for FDA Preemption*, in FEDERAL PREEMPTION, *supra* note 1, at 82–85. On tobacco, see, e.g., *Altria Group, Inc. v. Good*, 129 S. Ct. 538 (2008); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 546–51 (2001); *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516–24 (1992). On banking, see, e.g., *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1 (2007); *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996); see also Hal S. Scott, *Federalism and Financial Regulation*, in FEDERAL PREEMPTION, *supra* note 1, at 140–48. On air transportation, see, e.g., *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995). On securities, see, e.g., *Merrill Lynch, Inc. v. Dabit*, 547 U.S. 71 (2006); *Guice v. Charles Schwab & Co.*, 674 N.E.2d 282 (N.Y. Ct. App. 1996); *Dahl v. Charles Schwab & Co.*, 545 N.W.2d 918 (Minn. 1996); see also Scott, *supra*, at 148–52. On cars,

preemption determines the diversity, scope, and delivery of a wide variety of important government services to citizens, it is the issue of constitutional law that most directly impacts everyday life.<sup>3</sup> Yet preemption remains profoundly under-theorized: We lack a full account of the constitutional norms that authorize, and perhaps constrain, the national government's authority to preempt state law and the ways in which those norms interact with each other.

Some instances of preemption are easily explained. If a Nevada statute bans mining within ten miles of the Grand Canyon but a federal statute that permits mining up to two miles from Canyon where the miners obtain a federal license, a court deciding whether federal licensees may mine five miles from the Canyon has a relatively straightforward answer. State and federal law purport to govern the same conduct but require different outcomes; state law is thus clearly "contrary" to federal law and the Supremacy Clause commands the court to apply the federal statute. But now imagine that a federal statute requires chemical manufacturers to place warning labels on their canisters and includes a provision prohibiting states from imposing "different or additional safety-related requirements" on the covered chemicals. Public school officials ask a state health agency to decide whether a state statute prohibiting the use of "dangerous" chemicals in schools applies to chemicals covered by the federal statute. Chemical manufacturers seek an injunction to stop the state administrative proceedings, arguing that the federal statute preempts the state statute and the state agency's authority over the federally regulated chemicals. The manufacturers also argue that the federal statute preempts a state tort suit involving a student who was injured by exposure to one of the chemicals. Preemption in these situations would strip a state statute of legal effect, deprive a state agency of authority, and nullify a state common law claim. Under current doctrine, the chemical manufacturers' preemption arguments would probably succeed.

But why? Neither the state statute nor the administrative proceeding seem "contrary to" the federal labeling requirement—we do not know yet whether the state statute applies to chemicals subject to the federal statute; and even if it does, we do not know that the state agency will issue a decision that will contravene the federal labeling requirement. The tort suit does not seem "contrary" either—determining the manufacturer's liability for an injury caused by a product does not seem related to the content of the label. Preemption in these situations does not depend on state law conflicting with the substantive federal law provision—the labeling requirement—but rather

---

see, e.g., *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861 (2000). On boats, see, e.g., *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

<sup>3</sup> See Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 768 (1994); Young, *Federalisms*, *supra* note 1, at 53–58.

with Congress's intent to negate other state-law safety requirements applicable to the federally regulated chemicals. And nothing really turns on the fact that, in the example, Congress expressed its intent to do that in the statutory language; courts often infer that intention from legislative history or the structure or purposes of the federal statute. What gives Congress the authority to nullify existing state laws on and bar future state regulation of a subject, regardless of conflict with substantive requirements of federal law?

There has been no clear answer from the courts. Judicial preemption doctrine is thin and confusing.<sup>4</sup> The judicial approach boils down to identifying and implementing Congress's intent regarding preemption. The presumption against preemption requires that intent to be relatively clear, but it does not require that it be stated in the statutory text.<sup>5</sup> This approach seems fine in cases, like the mining example, where state and federal law clearly conflict and the language of the Supremacy Clause directs the outcome.

---

<sup>4</sup> See *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956) (noting that, in preemption cases, "[t]his Court . . . has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference."); Robert R. Gasaway & Ashley C. Parrish, *The Problem of Federal Preemption: Toward a Formal Solution*, in *FEDERAL PREEMPTION*, *supra* note 1, at 220; Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 741–42 (2008); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 232–33 & nn.26–30 (2000); David B. Spence & Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 CAL. L. REV. 1125, 1146 (1999) (arguing that preemption doctrine has created a "conflicted and fractured body of case law").

<sup>5</sup> See Garrick B. Pursley, *Avoiding Deference Questions*, 44 TULSA L. REV. 557, 557 (2009) [hereinafter Pursley, *Deference*]; Garrick B. Pursley, *The Structure of Preemption Decisions*, 85 NEB. L. REV. 912, 925–29 (2007) [hereinafter Pursley, *Structure*]. On the presumption against preemption, see *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230–31 (1947); *Mintz v. Baldwin*, 289 U.S. 346, 351 (1933); Young, *Federalism Doctrine*, *supra* note 1, at 1848–50. On judicial recitation of the Supremacy Clause, see Gardbaum, *supra* note 3, at 769; Pursley, *Structure*, *supra*, at 926, 941–53 & nn.174–77. On the rule that congressional intent is determinative, see *Geier*, 529 U.S. at 884; *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 96 (1992); Merrill, *supra* note 4, at 740; Pursley, *Structure*, *supra*, at 926–27; Young, *Federal Preemption*, *supra* note 1, at 257. Application of the presumption against preemption has been confusing. See Young, *Executive Preemption*, *supra* note 1, at 876–77 & n.45; Young, *Federal Preemption*, *supra* note 1, at 262–63. Compare *United States v. Locke*, 529 U.S. 89, 103–04 (2000) (limiting the presumption to areas of "traditional" state authority), with *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (plurality opinion) (stating that the presumption is applicable "in all pre-emption cases"). The Court's recent hints that the presumption should apply in all preemption cases may clarify things. See *Wyeth*, 129 S. Ct. at 1194; *Altria*, 129 S. Ct. at 543–44. But the Court has retained the most confusing element of the doctrine—the need to identify areas of "traditional" state authority—by suggesting gradations in the "force" of the presumption based on whether the potentially preempted state law occupies such an area. See *Altria*, 129 S. Ct. at 543–44. And in any case, the focus is on congressional intent.

Congressional intent regarding the effect of ambiguous substantive provisions of a statute may be relevant to determining whether there is a conflict in such cases, but that kind of congressional intent is different from the intent to displace state law regardless of conflict. And this latter intent is what courts consider relevant in preemption situations like the ones under our imaginary chemical labeling statute. Courts continue to portray the preemption inquiry as a question of whether state law is “contrary” to federal law under the Supremacy Clause;<sup>6</sup> so in these situations courts appear to think that being “contrary” to Congress’s intent that there should be no state law is sufficient to trigger the Supremacy Clause. Even assuming that is a plausible construction of “to the Contrary” in the Supremacy Clause, we still need to know where *Congress* gets the authority to legislate in this way (either explicitly, as in the hypothetical chemical preemption provision, or implicitly when courts infer Congress’s intent to displace non-conflicting state law from the legislative history, structure, or purposes of a federal statute that is otherwise silent on the issue).

The courts focus on the Supremacy Clause, so it seems like one candidate for the source of Congress’s displacement authority. But that Clause does not obviously confer any additional authority on Congress at all. It is in Article VI, quite separate from the provisions conferring congressional authority; and the only clear textual requirement is that courts apply federal law where potentially applicable state law is “to the Contrary.”<sup>7</sup> Even if the Supremacy Clause is the source of Congress’s power to displace state law and regulatory authority—which seems unlikely—courts in their rush to deference have not explained how that is so.<sup>8</sup> Given the limitations of the Clause’s text—even if we construe the Clause to confer power on Congress, it is at least clear that only “contrary” state laws may be displaced—we should hope to see Congress making efforts to interpret the Clause’s language and determine whether state laws it considers displacing fit its interpretation. Congress is, after all, bound to stay within the limits of its constitutional authority, even if courts are unwilling to rigorously enforce those limits.

Displacement may just be an exercise of one of Congress’s enumerated powers, like the Commerce power. Still, even with a deferential standard of judicial review, Congress remains constitutionally obligated to determine in each instance whether displacement is a legitimate regulation of interstate commerce, and we should hope to see congressional findings to that effect. Another possibility is that Congress’s displacement authority comes from the

---

<sup>6</sup> See Gardbaum, *supra* note 3, at 769 (observing that “statements of preemption law almost routinely ‘start from the top’ with a reference to the Supremacy Clause”); Pursley, *Structure*, *supra* note 5, at 926, 941–53 & nn.174–77.

<sup>7</sup> U.S. CONST. art. VI, cl. 2.

<sup>8</sup> See Pursley, *Structure*, *supra* note 5, at 929–36.

way that its enumerated powers are augmented by the Supremacy Clause or Necessary and Proper Clause. We might think that combination results in something like the following proposition of constitutional law: “When Congress is constitutionally empowered to legislate, it may, if it chooses, make its statute the exclusive law on the subject by excluding any potentially applicable state law.” This might be right, but judicial decisions do not tell us one way or the other.<sup>9</sup> And, once again, even with judicial deference Congress itself still must determine whether displacement is permissible. From the phrasing of my hypothetical constitutional norm, the relevant question might be about defining the category of state law that is fairly characterized as “on the subject” of the federal statute and thus legitimately subject to displacement. If Congress is drafting an express preemption clause like the one in the chemical example, the language might be broadened, or may have to be narrowed, depending on the answer. Or, if the Necessary and Proper Clause is involved, we should hope for some congressional consideration of whether displacement is in fact necessary—perhaps in the form of a finding that national regulatory uniformity is required. If “propriety” is also an outer limit, considerations about the effect of the proposed displacement on state regulatory authority might be relevant. Too much displacement may do enough damage to the states to outweigh the uniformity benefit.

Congress’s displacement authority may be plenary, admitting of no limitation in virtue of its constitutional source, and thus these sorts of considerations may be irrelevant. But other constitutional requirements may constrain Congress’s displacement power from the outside. The idea that Congress may displace non-conflicting state law—and, in fact, states’ power to enact potentially related laws—by statute whenever it chooses appears at least in tension with constitutional doctrines like the anti-commandeering rule of *New York v. United States*<sup>10</sup> that are based on the idea that state governments retain some meaningful degree of independence within the federal system.<sup>11</sup> Even if courts are unlikely to enforce such external, federalism-based limitations on Congress’s displacement power—as they have proved to be with respect to the Commerce power, for example—Congress remains obligated to determine whether such limitations preclude displacement proposals. Only a serious study of Congress’s decisionmaking about preemption—something that, so far, has not been undertaken—will tell us which constitutional considerations Congress believes to be relevant to its authority to preempt state law and the extent to which it takes those considerations seriously in the legislative process.

---

<sup>9</sup> See *id.*

<sup>10</sup> 505 U.S. 144 (1992).

<sup>11</sup> See Pursley, *Structure*, *supra* note 5, at 929–36.

Preemption based on a direct conflict—the mining example—does seem to be a simple matter of ordinary legislation plus the Supremacy Clause. The question of congressional power is just whether Congress had authority to enact the substantive statutory provision that does the preempting. The simplicity of the answer is probably why courts do not bother with the question in such cases. But courts never ask whether *displacement* is within Congress's legislative power either, even though the judicial focus on congressional intent makes it seem that displacement, too, is accomplished by the force Congress's legislative powers alone.<sup>12</sup> This suggests that courts are deferring to Congress on the question of displacement's permissibility, as they do with so many other basic questions of legislative power. But even where deference to Congress makes judicial scrutiny unlikely, federal legislation still must be somehow constitutionally authorized. So even if displacing state law is a permissible exercise of legislative power, as courts appear to assume, we still need to know the constitutional basis for it—both for an accurate description of our constitutional scheme and to determine whether, judicial deference or not, Congress is abiding by any limitations on its powers. And the absence of a robust judicial explanation of how all aspects of preemption doctrine are grounded on the Constitution raises another important question. Judge-made constitutional doctrines—like the rule of deference to congressional intent on preemption and displacement—depend for their legitimacy on their faithful implementation of constitutional norms. Thus confusion about the textual source and content of the constitutional norms governing preemption naturally leads one to wonder whether current judicial preemption doctrine is justified.

My goal in this Article is to begin giving preemption some of its missing theoretical backbone. Judicial decisions do not offer much insight, so we need to look elsewhere. And that may be appropriate as well as necessary: Judicial silence on questions about the constitutional norms governing preemption may reflect the view that some other actor has primary authority to develop and act on an understanding of whether and how much preemption is constitutionally permissible. Since courts repeatedly

---

<sup>12</sup> See Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2092 (2000); Pursley, *Structure*, *supra* note 5, at 917–18; Young, *Two Cheers*, *supra* note 1, at 1383. Federal statutes are not the only source of preemption, but they are the primary one. Preemption by federal administrative agencies has a literature all its own. See generally Nina A. Mendelson, *Chevron and Preemption*, 102 MICH. L. REV. 737, 794–95 (2004); Pursley, *Deference*, *supra* note 5; Young, *Executive Preemption*, *supra* note 1. Administrative preemption may well eventually outstrip statutory preemption, but at least for now agency preemption issues arise in only a small proportion of Supreme Court cases. See William N. Eskridge, Jr., *Vetogates*, *Chevron*, *Preemption*, 83 NOTRE DAME L. REV. 1441, 1468 n.117, 1487 app. A (2008) (reporting that of the 131 cases involving preemption issues decided between the Court's 1984 and 2005 terms, only about twenty percent involved questions of whether state law was preempted by agency action itself).



emphasize that Congress's intent determines the existence and scope of preemption, and have accordingly left primarily to Congress the task of implementing the constitutional requirements for and limitations on preemption, it makes sense to look to congressional practice for insights into preemption's constitutional grounding. One of my principal arguments will be that judicial deference to congressional decisionmaking about preemption depends for its legitimacy on the assumption that Congress will make preemption decisions in a manner consistent with the constitutional norms governing national preemptive authority. If the judicial assumption is justified, then Congress's actions with respect to preemption should provide information about preemption's constitutional grounding and constitutionally permissible scope. Congress's understanding of the constitutional norms governing its preemptive authority will help flesh out our descriptive account of constitutional practice. If it turns out that Congress does have a coherent view, that fact may be enough to justify judicial preemption doctrine even if we ultimately conclude that Congress's understanding of the relevant constitutional norms is incorrect. But a negative evaluation of Congress's constitutional views about preemption will, perhaps, raise broader concerns—at least if we take seriously the idea that constitutional norms constrain the government and not the other way around.

The institutional differences between Congress and the courts, and the resulting differences in the form of congressional and judicial actions, make identifying and interpreting the relevant information about Congress's treatment of preemption a large task. I do not propose to complete that task here. But I will make a start, and I will start at the very bottom. Part II is a background on judicial preemption doctrine—I discuss the varieties of preemption and argue that deeper constitutional justification is needed for forms of preemption that nullify enacted state laws and eliminate state regulatory authority. I then discuss how the question of preemption's constitutional justification dovetails with basic debates about justifying judicial constitutional decision rules. In Part III, I turn to the theoretical framework for the investigation of Congress, discussing conceptual issues relating to the idea of congressional constitutional interpretation in general. I provide some responses to prominent critiques and argue that congressional constitutional interpretation is possible in principle. I also discuss some issues relevant to a pragmatic comparison of the institutional competence of courts and Congress to engage in constitutional deliberation and decisionmaking and argue that, at least on preemption, Congress has the advantage.

In Part IV, I take up evidentiary issues and discuss what congressional constitutional "views" might look like. After dealing with some conceptual questions and describing some legitimate sources of evidence for Congress's views about the constitutional norms governing preemption, I examine one

category of evidence that provides a logical starting point: Congress's consideration and enactment of "framework" statutes that self-consciously modify the process by which Congress deliberates about and enacts legislation that preempts state law.<sup>13</sup> I describe several framework statutes relating to preemption and argue that they are evidence of Congress's determination that preemptive legislation should have to overcome more significant pre-enactment obstacles than ordinary legislation. This may reflect a requirement of the constitutional norms governing preemption—and one that is inconsistent with current judicial doctrine. But it does not precisely identify the constitutional source of the national government's preemptive authority. Heightened procedural requirements for preemptive legislation could arise from several sources—they could be based on Congress's construction of the Necessary and Proper Clause, which some argue is the constitutional source of preemptive authority; but they also may be designed to implement constitutional federalism norms, which may be the constitutional basis for preemptive authority but also may constitute an external limitation on a preemptive authority that springs from a different constitutional source.

Since framework laws provide only a part of what will be a much larger picture of Congress's views about preemption's governing constitutional norms, I conclude by suggesting additional categories of evidence that might flesh out those views and preview how I plan to approach them. Finally, I consider some follow-on questions, including whether judicial preemption doctrine requires revision in light of Congress's views.

## II. THE CONCEPTUAL GAP IN JUDICIAL PREEMPTION DOCTRINE

Preemption typically is subcategorized by the form of congressional action that does the preempting. "Express" preemption invalidates state laws that fall within the scope of a statutory provision in which Congress has specifically stated that certain state laws are to be preempted.<sup>14</sup> "Implied" preemption invalidates state laws that survive express preemption—either because they fall outside the scope of the statute's express preemption clause

---

<sup>13</sup> See generally Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113 (1997) [hereinafter Garrett, *Enhancing*]; Elizabeth Garrett, *Framework Legislation and Federalism*, 83 NOTRE DAME L. REV. 1495 (2008) [hereinafter Garrett, *Federalism*]; Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. CONTEMP. LEGAL ISSUES 717 (2005) [hereinafter Garrett, *Purposes*].

<sup>14</sup> Congressional intent to preempt "may be explicitly stated in the statute's language." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); see, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541–48 (2001); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95–98 (1983).

or because the federal statute at issue has no such clause—but nevertheless conflict with the federal statute. Implied preemption may arise from at least two kinds of conflicts between state and federal law: “Direct conflict” preemption occurs where state and federal law impose different requirements (to put it another way, where applying state law in a case would create a different result than would applying federal law);<sup>15</sup> and “obstacle” preemption occurs where state law does not directly conflict with any particular federal requirement but nevertheless is inconsistent with Congress’s aims.<sup>16</sup> Finally, “field” preemption occurs where Congress is said to have taken exclusive control of an entire regulatory subject, invalidating all state law and regulatory authority on that subject.<sup>17</sup> While there is—once again—some debate over the categorization, that terrain has been well-covered elsewhere.<sup>18</sup> I want to avoid some of the complexity of the standard categorization and just distinguish instances of preemption that lack clear constitutional justification.

When courts refer to the Constitution in relation to preemption issues, they exclusively cite the Supremacy Clause.<sup>19</sup> But courts have not definitively construed the Supremacy Clause in a way that grounds all varieties of judicial preemption doctrine. Instead, they repeatedly and

---

<sup>15</sup> Courts hold state laws preempted where “the object sought to be obtained by the federal law and the character of the obligations imposed by it . . . reveal” that conflicting state laws would frustrate the federal scheme such that one can reasonably infer Congress intended to preempt the conflicting state requirements. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 204 (1983) (internal quotation marks omitted); *see, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 235–36 (1947).

<sup>16</sup> Courts hold state law preempted if it “stands as an obstacle to the accomplishment an execution of the full purposes and objectives of Congress.” *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See, e.g., United States v. Locke*, 529 U.S. 89, 115–16 (2000); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 156–57 (1982).

<sup>17</sup> Field preemption occurs where “[t]he scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,” or where “the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.” *Rice*, 331 U.S. at 230; *see, e.g., Textile Workers Union v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

<sup>18</sup> *See* S. Candice Hoke, *Transcending Conventional Supremacy: A Reconstruction of the Supremacy Clause*, 24 CONN. L. REV. 829, 851 n.103 (1992); Merrill, *supra* note 4, at 738–40 (observing that there are “multiple categories of implied preemption, the exact number depending on who is doing the counting”); Garrick B. Pursley, *Rationalizing Complete Preemption After Beneficial National Bank v. Anderson: A New Rule, a New Justification*, 54 DRAKE L. REV. 371, 385–92 (2006); Young, *Two Cheers*, *supra* note 1, at 1377–80.

<sup>19</sup> Sometimes, especially recently, courts do not mention the Constitution at all. *See, e.g., Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dab*t, 547 U.S. 71 (2006).

formulaically set out something like the following at the beginning of preemption discussions:

Article VI, cl. 2, of the United States Constitution commands that the laws of the United States “shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” . . . State action may be foreclosed by express language in a congressional enactment . . . by implication from the depth and breadth of a congressional scheme that occupies the legislative field . . . or by implication because of a conflict with a congressional enactment.<sup>20</sup>

Notice the gap here—the statement jumps without further ado from recitation of the Supremacy Clause’s text to listing the ways that Congress may “foreclose” state action. But conceptually, preemption cases involve *two* basic questions: (1) is preemption constitutionally permitted in this instance; and (2) is the particular state law at issue in fact preempted? The first—call it the authorization question—asks whether Congress is constitutionally empowered to preempt state law. The second—call it the implementation question—asks whether Congress’s exercise of preemptive authority affects a specific state law. The judicial analytic framework set out above explicitly addresses only the implementation question. This is not too troubling since most or all judicial rules *implementing* preemption may (with some work) be properly grounded on the Supremacy Clause if we assume that preemption is *authorized* to begin with.<sup>21</sup> The authorization question is much more interesting. It is a threshold question that must be answered affirmatively before implementation can (legitimately!) be considered. But courts never squarely address it.

Judicial treatment of the authorization question is confused and confusing. In applying a rule that congressional intent is determinative of the existence and scope of preemption, courts appear to assume that Congress is always and already authorized to preempt state law.<sup>22</sup> They seem to read the Supremacy Clause as a judicial rule of decision designed to implement Congress’s assumed authority to preempt, *viz.*, a court should hold state authority foreclosed wherever the court can determine that Congress intended to foreclose it.<sup>23</sup> But the Supremacy Clause does not obviously give

---

<sup>20</sup> *Reilly*, 533 U.S. at 540–41 (citations omitted; first ellipses in original).

<sup>21</sup> See *infra* notes 44–47 and accompanying text. See generally Hoke, *supra* note 18; Nelson, *supra* note 4.

<sup>22</sup> See Pursley, *Structure*, *supra* note 5, at 938–40.

<sup>23</sup> See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 544 (1992) (Scalia & Thomas, JJ., concurring in part and dissenting in part) (“Under the Supremacy Clause . . . our job is to interpret Congress’s decrees of pre-emption neither narrowly nor broadly, but in accordance with their apparent meaning.”); see Gardbaum, *supra* note 3, at 803, 776 n.28 (noting that the “standard view” that the Supremacy Clause is the

Congress a *plenary* power of preemption, nor have courts said as much.<sup>24</sup> There may be an implicit judicial answer to the authorization question functioning behind the scenes in preemption decisions; but until we determine the answer courts have been assuming, we cannot understand preemption's constitutional basis or evaluate the legitimacy of judicial preemption decisions.<sup>25</sup> And as far as visible judicial constitutional interpretation goes, we have only the bare recitation of the Supremacy Clause. While there are at least hypothetical "clear cases" of preemption that would follow directly from the language of the Clause, most modern forms of preemption do not find such easy justification. And since courts offer no other constitutional source for Congress's authority to preempt, it appears that we have a problem.

To highlight this gap in judicial analysis of preemption, we should start where courts do and try to derive authorization for all forms of preemption from the Supremacy Clause.<sup>26</sup> It is no easy task. First, the Supremacy Clause does not clearly authorize preemption in the presence of all the kinds of federal/state law conflicts that courts identify. Second, and more importantly, the Supremacy Clause does not obviously authorize preemption's predominant legal effect of wholly invalidating state law and eliminating preexisting state regulatory authority. To tentatively explain the gap, I argue that preemption decisions may be instances of judicial underenforcement of pertinent constitutional norms. There are good reasons for courts to think that Congress ought to determine whether and when preemption is constitutionally authorized. So it may be that courts are satisfied to handle only the implementation of preemption, leaving the authorization question to Congress. This hypothesis leads, for reasons I explain below, to the exploration of congressional thinking about preemption that occupies the bulk of this Article.

---

relevant constitutional provision in all preemption cases is typically "asserted peremptorily and without explanation both in scholarly works and in virtually every modern preemption case decided by the Supreme Court"); Pursley, *Structure*, *supra* note 5, at 926–27, 941 (similar); *see also* Nelson, *supra* note 4 (arguing that the Supremacy Clause is a judicial rule of decision similar to a statutory non obstante clause).

<sup>24</sup> *See* Pursley, *Structure*, *supra* note 5, at 947–50.

<sup>25</sup> *See Reilly*, 533 U.S. at 540–41.

<sup>26</sup> The Supreme Court has vaguely characterized its preemption rules as "stem[ming]" from the Supremacy Clause, *see* *Hayfield N. Ry. Co., Inc. v. Chi. & N.W. Transp. Co.*, 467 U.S. 622, 627 (1984); "deriv[ing]" from the Supremacy Clause, *see* *Gade*, 505 U.S. at 108; "flow[ing]" from the Supremacy Clause, *see* *North Dakota v. United States*, 495 U.S. 423, 451 (1990); as "the practical manifestation of" the Supremacy Clause, *see* *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986); and as "ha[ving] its roots in" the Supremacy Clause, *see* *de la Cuesta*, 458 U.S. at 152, among other formulations.

### A. Clear Cases Versus Indirect Conflicts

Despite confusing judicial treatment, it may be that preemption is just an application of the plain language of the Supremacy Clause. For some “clear cases” it does appear to be that simple.<sup>27</sup> As Candice Hoke has argued, justifying preemption by reference to the Supremacy Clause places a premium on figuring out what kinds of federal/state law conflicts are proscribed by the phrase “to the contrary.”<sup>28</sup> This language clearly refers to at least cases where it is logically impossible for a court to apply both the national and state requirements. A close, but not exact, example is *Gibbons v. Ogden*, where a state statute granted a steamboat operator territorial exclusivity over waters that a federal license allowed a competitor to access.<sup>29</sup>

*Gibbons* did not involve a strict logical conflict, since the holder of the federal license could have complied with both federal and state law by simply not using the license to operate in the waters covered by the state-granted exclusivity right.<sup>30</sup> We would have a strict logical conflict if, instead, federal law required the competitor to operate in those waters.<sup>31</sup> At one remove from logical impossibility are situations like that in *Gibbons* where state law prohibits something that federal law permits, or vice versa. Assuming that the beneficiary of a legal permission likely will exercise it, this situation is apt to create a direct conflict between state and federal law of the following form: A suit to enforce the permission or the prohibition will present the court with a choice between federal and state rules of decision that compel opposite outcomes. It is also reasonably clear that the Supremacy Clause’s “to the Contrary” language covers these direct (but not logical) conflicts. These clear cases may be generalized: the plain language of the Supremacy Clause justifies the rule that a court must apply federal law to disputes where a potentially applicable state law imposes contradictory requirements—that is, “when courts cannot apply both state law and federal law, but instead must choose between them,” the Supremacy Clause’s plain language mandates choosing federal law.<sup>32</sup>

As to preemption’s effect on state law, the language of the Supremacy Clause may be most naturally read like a choice of law provision<sup>33</sup>—it

---

<sup>27</sup> See Pursley, *Structure*, *supra* note 5, at 923–24.

<sup>28</sup> See Hoke, *supra* note 18, at 888–89, 889 nn.287–88.

<sup>29</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 212–20 (1824).

<sup>30</sup> See Nelson, *supra* note 4, at 228 & n.15.

<sup>31</sup> See *id.*; see also *Geier*, 529 U.S. at 873.

<sup>32</sup> See Nelson, *supra* note 4, at 251; see also Gardbaum, *supra* note 3, at 770–73; Pursley, *Structure*, *supra* note 5, at 923–24.

<sup>33</sup> See Dinh, *supra* note 12, at 2088–90 (arguing that this was the intent of the Clause’s drafters).

provides that all courts are bound to follow federal law “notwithstanding” state law “to the Contrary.”<sup>34</sup> In a hypothetical clear case, then, the court would merely apply federal law rather than state law to resolve the dispute. On an application of the clearest meaning of the Supremacy Clause, then, a preemption decision would function like a choice of law decision: the disregarded state law would remain valid and binding on non-parties.<sup>35</sup> Gardbaum calls this kind of legal effect “supremacy”;<sup>36</sup> Merrill calls it “trumping.”<sup>37</sup> The point is that the challenged state law—and the state government’s authority to issue it—are not displaced beyond the concrete dispute involved in the judicial decision. Unfortunately for intelligibility’s sake, modern preemption cases rarely involve this kind of straightforward application of the plain meaning of the Supremacy Clause.

Most modern preemption cases differ from clear cases because they involve different kinds of conflicts—call them “indirect conflicts”—which do not obviously fall within the language of the Supremacy Clause. A recurrent example is the situation where state and federal law regulate the same conduct but one or the other imposes stricter requirements.<sup>38</sup> According to existing doctrine, state law may be preempted in these situations because it otherwise constitutes an “obstacle” to federal regulation or is inconsistent with the “goals” of the federal law.<sup>39</sup> But the Supremacy Clause’s “to the contrary” language does not obviously cover these indirect conflicts.<sup>40</sup> Then there are the extreme cases where it appears that no conflict is required. State law may be preempted where federal law purports to occupy the entire “field” of regulation,<sup>41</sup> or where Congress by statute expressly bars state

---

<sup>34</sup> U.S. CONST., art. VI, cl. 2.

<sup>35</sup> See Gasaway & Parrish, *supra* note 4, at 237 (noting similarities between preemption and choice of law doctrines).

<sup>36</sup> See Gardbaum, *supra* note 3, at 770–71.

<sup>37</sup> See Merrill, *supra* note 4, at 730.

<sup>38</sup> See, e.g., *Riegel*, 128 S. Ct. 999 (federal statute imposing safety requirements on medical device manufacturers preempted stricter state tort law medical device safety standards); *Reilly*, 533 U.S. 525 (federal statute limiting cigarette advertising preempted stricter state cigarette advertising regulations); *Geier*, 529 U.S. 861 (federal regulations requiring automobile manufacturers to include certain safety features preempted stricter state tort law automobile safety equipment requirements).

<sup>39</sup> See, e.g., *Locke*, 529 U.S. 89; *de la Cuesta*, 458 U.S. at 156–57; *Franklin*, 347 U.S. at 378.

<sup>40</sup> Cf. Hoke, *supra* note 18, at 888–89, 889 nn.287–88 (arguing that “to the contrary” can sweep in all the instances of preemption if courts properly characterize the conflict). But see Nelson, *supra* note 4, at 246–64 (arguing that the Supremacy Clause requires courts to apply federal law rather than state law where one would repeal the other if enacted by the same legislature).

<sup>41</sup> See, e.g., *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

regulation of a subject.<sup>42</sup> If these cases require any conflict at all, at most they appear to involve the indirect conflict between state law and Congress's intent, express or implied, that there should be no state law at all on the subject.<sup>43</sup>

So, as we move outward from the clear cases along the federal/state law conflict axis, we find instances of preemption that are less and less obviously grounded in the Supremacy Clause and, accordingly, more and more in need of constitutional justification. Courts cite the Supremacy Clause religiously in preemption cases,<sup>44</sup> and it is possible—with some work—to construe the Clause to cover all the indirect conflicts on which courts have based preemption holdings.<sup>45</sup> Commentators suggest that the trick is to construe “to the contrary” broadly to mean something like “interference,” and to characterize marginal cases—like field preemption or preemption of state laws that are harmonious with the federal scheme—as “conflicts” between state law and congressional intent that there be no state regulation on the subject.<sup>46</sup> Leaving aside substantive criticisms of these constructions, the threshold problem is that courts have not explicitly adopted any of them.<sup>47</sup>

### B. *Effects on State Law*

Even assuming that the Supremacy Clause could be plausibly construed to support preemption based on every judicially identified “conflict” and that judicial decisions implicitly operationalize such a construction; preemption's constitutional grounding remains problematic because of preemption's effect on state law. Courts hold that preemption entirely invalidates state law and eliminates swaths of preexisting state regulatory authority. Gardbaum calls this legal effect “preemption”; Merrill calls it “displacement.”<sup>48</sup> To use

---

<sup>42</sup> See, e.g., *Riegel*, 552 U.S. at 323.

<sup>43</sup> Gardbaum characterizes these as “second-order” or “jurisdictional” conflicts. See Gardbaum, *supra* note 3, at 775–76. The Supremacy Clause only obviously requires courts to invalidate state laws that conflict with federal “law,” and the most natural reading of that language is that a substantive provision of federal law is required for preemption. See generally Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321 (2001). But congressional “purposes” that are not implemented in specific statutory provisions do not obviously fall within the Supremacy Clause definition of potentially preemptive federal “law.”

<sup>44</sup> See Gardbaum, *supra* note 3, at 769; Pursley, *Structure*, *supra* note 5, at 926, 941 & nn.174–77.

<sup>45</sup> See Hoke, *supra* note 18, at 888–8, 889 nn.287–88; Nelson, *supra* note 4, at 260–61.

<sup>46</sup> See Hoke, *supra* note 18, at 888–89, 889 nn.287–88; Nelson, *supra* note 4, at 260–61.

<sup>47</sup> See Pursley, *Structure*, *supra* note 5, at 941–53.

<sup>48</sup> See Gardbaum, *supra* note 3, at 770–71; Merrill, *supra* note 5, at 730.



Candice Hoke's phrasing, most preemption is "jurispathic" in that it "kills off" state law and regulatory jurisdiction.<sup>49</sup>

In *Lorillard Tobacco Co. v. Reilly*,<sup>50</sup> for example, the Supreme Court made clear that the preemptive effect of the Federal Cigarette Labeling and Advertising Act (FCLAA) was to *nullify* Massachusetts tobacco advertising regulations.<sup>51</sup> The Court said, variously, that preemption "'bar[s] state action,'" "'supersede[s]'" state authority, "precludes States or localities from imposing" legal requirements, "'prohibit[s]'" state action, "prevent[s]" state law-making, "forbid[s]" state mandates, "foreclose[s]" state regulation, and, indeed, "nullif[ies]" state law.<sup>52</sup> Moreover, since *Reilly* involved a facial preemption challenge to the state regulations in the form of a declaratory judgment action initiated by the cigarette manufacturers, the Court did not even have the option—as it would in a clear case—of choosing between the potentially applicable state and federal standards.<sup>53</sup> Nevertheless, the Court assumed without further comment that Congress was constitutionally authorized to displace state law and focused on determining whether Congress intended to do so.<sup>54</sup> As a result of *Reilly*, Massachusetts lost at least the authority to enact regulations substantively identical to those the Court held preempted. In more dramatic instances, states are affirmatively ousted of regulatory authority beyond that required to enact the specifically contested measures.

*Rice v. Santa Fe Elevator Corp.*<sup>55</sup> is a powerful example. Rice complained to the Illinois Commerce Commission that Santa Fe violated the Illinois Public Utilities Act and the Illinois Grain Warehouse Act by, among other things, charging unreasonable rates and maintaining inadequate facilities.<sup>56</sup> Before the Illinois Commission issued any ruling, Santa Fe sought an injunction in federal court on preemption grounds; this was the action that went to the Supreme Court.<sup>57</sup> So the preemption issue came to the

---

<sup>49</sup> Hoke, *supra* note 18, at 694.

<sup>50</sup> 533 U.S. 525 (2001).

<sup>51</sup> *Id.* at 537. The FCLAA is codified at 15 U.S.C. §§ 1331–40 (2006).

<sup>52</sup> *See id.* at 541–52 (specifically, at 541 ("bars"), 542 ("supersedes" and "precludes"), 543 ("prohibits"), 545 ("prevents"), 546 ("nullifies"), 548 ("prohibits"), 549 ("forbids"), 552 ("forecloses")).

<sup>53</sup> *See id.* at 536–37.

<sup>54</sup> *See id.* at 540–41 ("In these cases, our task is to identify the *domain* expressly pre-empted . . .") (emphasis added); *see also supra* notes 22–26 and accompanying text. The Court, in fact, expressly distinguished its inquiry from an inquiry into Congress's constitutional authority to preempt. *See Reilly*, 533 U.S. at 550; *see also* discussion and text quoted *infra* note 69.

<sup>55</sup> 331 U.S. 218 (1947).

<sup>56</sup> *See id.* at 220–22.

<sup>57</sup> *See id.* at 222.

Court before Illinois actually imposed any requirements on Santa Fe.<sup>58</sup> While Rice urged the Court to consider whether potential Commission rulings on the particulars of Rice's complaint would conflict with federal law, the Court made clear that it was going beyond conflict preemption: Congress "did more than make the Federal Act paramount over state law in the event of conflict[;]" it "terminat[ed] the dual system of regulation."<sup>59</sup> The fact that the Commission might decide Rice's case in a manner fully consistent with federal requirements was irrelevant.<sup>60</sup> The federal statute simply terminated the states' acknowledged, preexisting authority to regulate grain storage matters that are also "regulated by the Federal Act."<sup>61</sup>

Displacement of state regulatory authority, Merrill notes, is "strong medicine."<sup>62</sup> Professor Young thinks it is about the strongest medicine around.<sup>63</sup> The overwhelming majority of modern preemption decisions displace state law and regulatory authority to one degree or another.<sup>64</sup> No easy reading of the Supremacy Clause authorizes this effect.<sup>65</sup> Epstein and Greve read *Rice* as a case about exclusive regulatory jurisdiction having "nothing to do . . . with the Supremacy Clause."<sup>66</sup> Perhaps the most obvious problem is that the Supremacy Clause is addressed to courts, not Congress, and is in fact separated by several articles from the constitutional provisions conferring congressional powers.<sup>67</sup> Merrill claims that at least the displacement effects of *judicial* preemption decisions may be grounded on the Supremacy Clause.<sup>68</sup> But courts have not explained the constitutional basis for Congress's power to displace state law and regulatory authority.<sup>69</sup>

---

<sup>58</sup> See *id.*

<sup>59</sup> Rice, 331 U.S. at 234; see *id.* at 231–32 (noting Rice's argument that "the Illinois regulatory scheme should be allowed to supplement the Federal Act . . . unless what the Commission does runs counter in fact to the federal policy").

<sup>60</sup> See *id.* at 231.

<sup>61</sup> *Id.* at 234. The Court recognized that "Congress legislated here in a field which the States have traditionally occupied." *Id.* at 230; see also *id.* at 236 (similar).

<sup>62</sup> Merrill, *supra* note 5, at 732.

<sup>63</sup> See Young, *Federal Preemption*, *supra* note 1, at 251–52; Young, *Federalism Doctrine*, *supra* note 1, at 1848.

<sup>64</sup> See Merrill, *supra* note 5, at 731.

<sup>65</sup> See Gardbaum, *supra* note 3, at 773–77.

<sup>66</sup> See Richard A. Epstein & Michael S. Greve, *Conclusion: Preemption Doctrine and Its Limits*, in *FEDERAL PREEMPTION* 309, 315–16.

<sup>67</sup> See Dinh, *supra* note 12, at 2088.

<sup>68</sup> See Merrill, *supra* note 5, at 736–38; see also Nelson, *supra* note 5, at 265–66.

<sup>69</sup> See Pursley, *Structure*, *supra* note 5, at 924–25. The Supreme Court has at least once expressly distinguished the question of preemption's authorizing norm from interpretation of the Supremacy Clause:

References to *Gibbons* are no help—*Gibbons* contains only the vague statement that preempted state laws must “yield.”<sup>70</sup> And again, the only rule consistently applied in preemption cases is the rule of deference to congressional intent.<sup>71</sup> In the light of preemption’s displacement effect, this rule leaves open slightly modified versions of the two questions I asked above: (1) What authorizes Congress to *displace* state law and regulatory authority?; and (2) Can the Supremacy Clause be construed to require that courts hold state law and regulatory authority *displaced* anytime congressional intent to preempt can be identified?<sup>72</sup> An answer to the former question seems to be a necessary precondition for any judicial preemption rule—even if the Supremacy Clause could be construed to allow courts to implement congressional preemptive authority in all the forms in which preemption occurs under current doctrine, that doctrine is under-explained without an account of the constitutional basis for Congress’s displacement authority. How could we know, for example, whether a change in congressional practice respecting preemption may justifiably prompt a change in judicial doctrine implementing preemption? How could we judge whether *Congress’s* practices respecting preemption are constitutionally legitimate? Figuring out the constitutional basis for Congress’s displacement authority is the necessary first step toward the answers. For one, we should wonder whether Congress’s displacement authority admits of any substantive limit, based on the Supremacy Clause or otherwise. Before examining whether Congress’s practice yields any insight, I want to dwell briefly on the implications of judicial silence on these questions.

---

Justice Stevens finds it ironic that we conclude that “federal law precludes States and localities from protecting children from dangerous products within 1,000 feet of a school,” in light of our prior conclusion that the “Federal Government lacks the constitutional authority to impose a similarly motivated ban” in *United States v. Lopez* . . . . The reference to *Lopez* is . . . inapposite. In *Lopez*, we held that Congress exceeded the limits of its Commerce Clause power in the Gun-Free School Zones Act of 1990 . . . . These cases, by contrast, concern the Supremacy Clause and the doctrine of pre-emption as applied in a case where Congress expressly precluded certain state regulations of cigarette advertising. Massachusetts did not raise a constitutional challenge to the FCLAA, and we are not confronted with whether Congress exceeded its constitutionally delegated authority in enacting the FCLAA.

*Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 550 (2001). In *Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986), the Court said that “[t]he Supremacy Clause, among other things, confirms that when Congress legislates within the scope of its constitutionally granted powers, that legislation may displace state law . . . .” *Id.* at 6. While this formulation is a refreshing departure from the typical, it does not explain how the Supremacy Clause empowers Congress to displace state law.

<sup>70</sup> *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 211 (1824).

<sup>71</sup> See Pursley, *Structure*, *supra* note 5, at 938–39.

<sup>72</sup> See Merrill, *supra* note 4, at 734–35; Nelson, *supra* note 4, at 265–66.

*C. Judicial Underenforcement of Preemption's Authorizing Norm*

I have argued elsewhere that because of preemption's particular displacing effect on state law and lawmaking authority, Congress's preemptive authority must be constitutional in stature.<sup>73</sup> As I have framed it here, the question is: what constitutional norm empowers Congress to displace state law and state regulatory authority? I mean to use "constitutional norm" broadly, to include both clear textual requirements and requirements that are determined after interpretation. "Norms" in this broad sense are distinct from constitutional "rules": the court-crafted doctrinal tests that aid in determining whether particular actions should be held to violate constitutional norms. The distinction between norms and rules is important: a variety of instrumental considerations may legitimately bear on the formulation of constitutional rules; as a result, rules may allow far more or less conduct than would the constitutional norm, if fully enforced. The judicial approach to the question of preemption's constitutional permissibility—essentially complete deference to Congress such that preemption is impliedly held permissible wherever congressional preemptive intent can be identified, even if only by inference—may reflect either an unstated judicial understanding that the relevant constitutional norm in fact allows every instance of preemption Congress intends or, instead, a constitutional rule that allows more preemption than would the underlying constitutional norm, if fully enforced. Though I am intuitively inclined to characterize judicial treatment of preemption's authorizing norm as the implementation of a deferential constitutional rule, I do not want to assume that is true here. But if the judicial approach does reflect a constitutional rule rather than the scope of the underlying constitutional norm, Congress should attend to the requirements of the underlying norm in deciding whether preemption is permissible.

What, then, is the relevant constitutional norm? A sensible way to start is by asking what provision in the constitutional text might give rise to what I will call preemption's constitutional "authorizing norm." Perhaps Congress's enumerated powers confer authority, by negative implication, to displace overlapping state law and regulatory jurisdiction when Congress acts affirmatively pursuant to one of those powers.<sup>74</sup> Gardbaum argues that displacement can only be grounded in the Necessary and Proper Clause.<sup>75</sup> Beyond the text are structural norms derived by inference from textual provisions. Constitutional federalism norms are candidates here. And, since federalism flows both ways, it may be that the maintenance of a well-

---

<sup>73</sup> See Pursley, *Structure*, *supra* note 5, at 941.

<sup>74</sup> I have criticized this view elsewhere. *See id.* at 946–47.

<sup>75</sup> See Gardbaum, *supra* note 3, at 781–82.

functioning federal system requires not only protection of state regulatory authority from national aggrandizement, but also protection of national regulatory authority from state interference.<sup>76</sup> For the moment, I want to assume nothing about the relative merit of these possibilities. My focus here is on the more basic question of how to determine which constitutional source of preemption's authorizing norm is accepted as the right one in our constitutional practice. Judicial silence and deference to Congress on the question of preemption's constitutional permissibility means that congressional practice regarding preemption may be the best source of evidence available for constructing a descriptive account of the constitutional requirements for and limitations on preemption, if any, that officials in our legal system accept as binding.

Along with this descriptive question, the puzzle about the source and the content of preemption's constitutional authorizing norm intersects a more basic set of conceptual questions about justifying the rules of decision that courts apply to resolve constitutional issues. Before turning to Congress, I want to take a moment to situate the question in this larger debate.

A consequence of distinguishing constitutional norms from rules developed to implement those norms is that oftentimes there will be a certain amount of ambiguity regarding the connection between the rules and the document. The rules will not always resemble the constitutional text that grounds them and there may be legitimate reasons for the discontinuity.<sup>77</sup> The *Miranda* warnings, for example, cannot be found in the Constitution and do not look much like the Fifth Amendment prohibition on coerced self-incrimination; but the *Miranda* rule is nevertheless justified as a desirable means for implementing the Fifth Amendment norm in the light of the realities of law enforcement on the ground.<sup>78</sup> And at least the Court made the constitutional basis for that rule clear.<sup>79</sup> But if the rule-making institution does not clearly identify the constitutional norm that grounds a decisional rule like *Miranda*'s, and instead just focuses on explaining the rule's non-constitutional justifications, things become more confusing. We may accept,

---

<sup>76</sup> Cf. *id.* at 947–48 (discussing a related idea).

<sup>77</sup> I am intentionally sidelining most of the nuance of important debates in constitutional theory about the nature and import of the norms/rules distinction. For my purposes, it is enough to note that the distinction itself is recognized and accepted. The language of constitutional “decision rules” comes from Professor Berman’s now-canonical substantive overview. See Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 92–100 (2004); see also Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1287–93, 1309–13 (2006); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1650–58 (2005).

<sup>78</sup> See *Miranda v. Arizona*, 384 U.S. 436, 441–45 (1966).

<sup>79</sup> See *id.*

and even embrace as necessary, the distinction between constitutional meaning and constitutional rules of decision;<sup>80</sup> but our general commitment to coherent justifications for legal norms should make us concerned to clarify the connection between the two in cases of ambiguity. After all, constitutional decision rules depend, at least in large part, on their grounding in the Constitution for their legitimacy as binding legal rules.

Two other complications arise when we distinguish constitutional meaning from constitutional rules. First, constitutional meaning may be elaborated by a different actor than the one tasked with crafting the implementing rules. An example of this situation is where the judiciary is the rule-maker and is either compelled by constitutional norms or chooses for instrumental reasons to make rules that underenforce the Constitution.<sup>81</sup> But a constitutional norm underenforced by a judicial rule nevertheless remains binding to its “full conceptual limits;” thus, if courts underenforce or simply do not adequately explain the norm, other actors must formulate their own understandings of the full scope of their constitutional obligations.<sup>82</sup> Second, constitutional rules may be grounded on the Constitution’s structural norms—federalism and the separation of powers—even though those norms have no canonical formulation in the constitutional text.<sup>83</sup> Since the connection between structural norms and the Constitution needs explanation itself, the constitutional basis for judicial decision rules implementing structural norms is one step further removed from the kind of clear, coherent constitutional justification that we should want.

Preemption presents all three dimensions of the explanatory/justificatory puzzle. We have the ambiguity problem: The basic judicial rule applied in most preemption cases—that courts must take congressional intent as

---

<sup>80</sup> See, e.g., RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 38–44 (2001); Berman, *supra* note 77, at 38; Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 2–3 (1975); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1222–24 (1978).

<sup>81</sup> The possibility of judicial underenforcement was one of the key insights of Dean Sager’s seminal article. See Sager, *supra* note 80, at 1221.

<sup>82</sup> As Sager explains:

[C]onstitutional norms which are underenforced by the federal judiciary should be understood to be legally valid to their full conceptual limits, and federal judicial decisions which stop short of these limits should be understood as delineating only the boundaries of the federal courts’ role in enforcing the norm: By “legally valid,” I mean that the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution, save only that the federal judiciary will not enforce these margins.

*Id.*

<sup>83</sup> See Young, *Federalism Doctrine*, *supra* note 1, at 1746.

determinative of whether and how much state law is displaced—is ambiguously connected to constitutional text.<sup>84</sup> We also have the division of labor problem. Courts applying this “congressional intent rule” do not explain what forms or degrees of preemption are and are not constitutionally permissible, whether the rule of deference to congressional intent is related to the permissibility question, or why Congress should have *de facto* authority to make the permissibility determination.<sup>85</sup> Thus, responsibility for hashing out the norm authorizing preemption, and for enforcing any limitations that norm may place on Congress’s preemptive power, falls outside the judiciary. The judicial rule signals that those responsibilities fall to Congress.<sup>86</sup> Finally, we may have the structural principle problem: on some accounts, preemption’s authorization arises from federalism norms. So too, the congressional intent rule courts apply may arise from separation of powers norms.

The preemption context introduces additional complications. On any view of the particular constitutional source of Congress’s preemptive authority, the question arises whether that authority is plenary or somehow limited.<sup>87</sup> Whether or not the power is plenary, judicial underenforcement of preemption’s authorizing norm may be constitutionally mandatory—like some political questions, the question of preemption’s permissibility may be “entrusted to one of the political branches” by constitutional mandate.<sup>88</sup> We need to know more about the relevant constitutional norms to know whether this is so. If judicial underenforcement in the form of deference to Congress is not constitutionally mandatory, the question of whether preemptive power is plenary becomes more important. If it is plenary—if no instance of preemption is constitutionally out of bounds—then judicial underenforcement finds easy instrumental justification on the ground that there just is not anything for courts to review. But a more robust account of the nature of preemption’s constitutional authorizing norm remains important, both for our general understanding of the constitutional powers of government and for understanding the justification for judicial deference in preemption cases. If Congress’s preemptive authority is limited, judicial underenforcement still may be instrumentally justified, for example, on the

---

<sup>84</sup> See Pursley, *Structure*, *supra* note 5, at 941–42; *supra* notes 19–26 and accompanying text. This is not the only decision rule that we find almost uniformly in preemption cases, just the one that I think needs explaining. The rule of priority—that preemption requires applying federal law instead of state law and not vice-versa—is fairly straightforwardly grounded in the Supremacy Clause. See Nelson, *supra* note 4, at 250–54; Pursley, *Deference*, *supra* note 5, at 581–82.

<sup>85</sup> See *supra* notes 22–25 and accompanying text.

<sup>86</sup> See Pursley, *Structure*, *supra* note 5, at 936–39.

<sup>87</sup> See *id.* at 946–51.

<sup>88</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

ground that Congress is relatively better than the courts at identifying and abiding by the relevant limitations. In that case, an account of Congress's views about the constitutional norms governing preemption might tell us both what the relevant limitations are, fleshing out our understanding of preemption's constitutional contours, and whether Congress has, in fact, been abiding by them. If the answer to this last question turns out to be "no," then the comparative institutional capacity assumption justifying the underenforcement approach will be called into doubt and more robust judicial enforcement of limitations on preemption may be required.<sup>89</sup>

These uncertainties call for further examination. While there are theoretical constitutional justifications for preemption, thus far we have no signal as to which, if any, such theory our public officials embrace. Given the high stakes involved with preemption's displacement of state law and regulatory power, this is concerning.<sup>90</sup> The judicial practice of deference suggests that we may be well served by looking to Congress, so that is where I turn now.

### III. CONGRESS'S CAPACITY FOR CONSTITUTIONAL DELIBERATION AND DECISIONMAKING

So far, I've argued that the judicial rule of deference to congressional intent in preemption cases is a form of underenforcement of the constitutional norms governing Congress's authority to preempt state law. The rule places the burden of identifying, elaborating, and adhering to that norm's requirements squarely on Congress; and thus it naturally raises questions about Congress's institutional capacity for constitutional deliberation and decisionmaking. The institutional capacity issue is not necessarily relevant to the justification for the judicial rule of deference to congressional intent in preemption cases. Deference may be constitutionally mandatory, regardless of Congress's capacity for decent constitutional interpretation. But if the judicial approach is justified on instrumental

---

<sup>89</sup> Since the scope of Congress's preemptive authority is unsettled, it may be that courts simply have not yet identified "judicially manageable standards" for evaluating the constitutional permissibility of preemption. This more extreme version of the argument against judicial institutional capacity is familiar from the political question setting. *See, e.g., id.* at 277–78; *Baker v. Carr*, 369 U.S. 186, 217 (1962). Even if preemptive authority is not plenary, judicial inability to construct a workable doctrine to enforce whatever limits there are may result in justified underenforcement in the form of deference to Congress. That deference may be permanent, based on the conclusion that manageable standards will never become available—the Court appears to have reached such a conclusion regarding political gerrymandering issues. *See Vieth*, 541 U.S. at 281. But since this is a non-mandatory reason for underenforcement, deference may be abandoned if judicially manageable standards are developed later.

<sup>90</sup> *See supra* notes 1–3 and accompanying text.



grounds rather than by constitutional command, then the question of relative institutional capacity may in fact be central to its justification—one prime candidate for an instrumental ground for judicial underenforcement is the premise that Congress has relatively greater institutional competence to make the relevant constitutional decisions. Leaving aside the justification for judicial preemption doctrine, the descriptive question remains: The fact is that current preemption doctrine defers substantial constitutional decisionmaking authority to Congress. The constitutional norms underenforced by deferential judicial doctrine should be more robustly observed in congressional practice, and congressional practice may provide the only other source of evidence on what our legal officials take the relevant constitutional norms to require. Thus, considerations of Congress's institutional capacity may be directly relevant to the basic project of figuring out the content of the constitutional law of preemption.

Are there reasons to think that Congress will engage in serious constitutional deliberation about preemption? In beginning to make the case that there are, I first discuss why consideration of Congress's institutional capacity for constitutional deliberation is important in the preemption context. I distinguish several kinds of questions and highlight the ones that I think are most relevant to this discussion. I then describe the institutional features of Congress that create what I call Congress's bare capacity for constitutional deliberation and decisionmaking, by which I mean the institutional characteristics and resources that support congressional constitutional deliberation considered before thinking about how things might actually work out in practice. Then I address some practical issues that bear on the possibility of Congress actually engaging in meaningful constitutional deliberation and decisionmaking about preemption. This is an important theoretical detour for two reasons. First, there are open debates surrounding some of the theoretical basics on which one needs to take a position in order to make the sort of claims about congressional constitutional deliberation that I want to make here and in future work. Second, exploring the basics of congressional constitutional capacity yields clues about where to look for evidence of Congress's constitutional decisionmaking about preemption, which is the subject of Part IV.

#### *A. The Relevant Questions About Institutional Capacity*

It is important at the outset to distinguish the task of describing congressional capacity for constitutional deliberation and decisionmaking from the task of evaluating congressional performance in constitutional deliberation and decisionmaking. The evaluative task is difficult because it requires a “benchmark of ‘good interpretation’” against which to measure

Congress's efforts.<sup>91</sup> We might choose a judicial benchmark, under which a "correct" congressional constitutional decision would be the one that accords with how a court would decide the constitutional question.<sup>92</sup> But this approach presupposes that judicial constitutional decisions are correct, or at least more correct than congressional decisions, and that presupposition must be based on either: the untenable position that the Constitution actually means whatever the Supreme Court says it means;<sup>93</sup> the contestable claim that the Supreme Court should exercise primary authority, superior to that of Congress, in constitutional interpretation;<sup>94</sup> or the unproven claim that judicial constitutional decisionmaking is more likely to be correct than congressional constitutional decisionmaking.<sup>95</sup> So the judicial benchmark approach appears incomplete—instead of a determination of correctness, we get a determination of consistency with judicial constitutional judgments whose correctness remains undetermined.<sup>96</sup>

Another problem with this approach is that judicial doctrine on many issues requires courts to defer to congressional policy judgments that bear on underlying constitutional questions or, perhaps, to congressional constitutional interpretation itself.<sup>97</sup> Preemption doctrine's congressional intent rule is a prime example at least of the former, and perhaps the latter. Deference of this sort would seem to bounce the question of constitutional correctness right back to Congress, and the judicial benchmark approach is speculative insofar as determining the benchmark "judicial" answer may require hypothesizing the result of a case no court has actually decided.<sup>98</sup>

---

<sup>91</sup> Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1292 (2001); Mark Tushnet, *Some Notes on Congressional Capacity to Interpret the Constitution*, 89 B.U. L. REV. 499, 500 (2009).

<sup>92</sup> See Garrett & Vermeule, *supra* note 91, at 1292–93; Tushnet, *supra* note 91, at 500. Larry Alexander and Frederick Schauer have defended the judicial benchmark approach to evaluating congressional constitutional interpretation. See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997).

<sup>93</sup> See Garrett & Vermeule, *supra* note 91, at 1293. Alexander and Schauer do not advance this argument: as Garrett and Vermeule note, their point "is an institutional one. The primary criterion for good constitutional law, the argument runs, is that it should be clear and stable; clarity and stability in turn require a single, paramount constitutional interpreter; and that interpreter should be the Court." *Id.*

<sup>94</sup> This does appear to be the basis for Alexander and Schauer's position. See Alexander & Schauer, *supra* note 92, at 1369–81.

<sup>95</sup> See Tushnet, *supra* note 91, at 500–01.

<sup>96</sup> See *id.* at 501.

<sup>97</sup> See *id.* at 500.

<sup>98</sup> See Garrett & Vermeule, *supra* note 91, at 1293. Congress does engage in this sort of predictive exercise at least some of the time—the potential for this to distort legislative constitutional efforts is the basis for Tushnet's argument that Congress's

Indeed, for constitutional questions of true first impression, or for those on which Congress may have exclusive decisional authority, we would have to conjure up not only a hypothetical judicial decision, but also hypothetical doctrinal rules, standards, tests and so on.

To avoid these problems, we might reject the judicial approach and instead evaluate congressional constitutional interpretation according to our own views about what constitutes good constitutional decisionmaking. But this option is also flawed, since the criteria for “good” constitutional decisionmaking vary from commentator to commentator.<sup>99</sup> Probably the best we can hope to do is make a good comparison of the institutional features of Congress and the courts, and attempt to determine whether those features suggest that one actor or the other is more likely to do a good job of deliberating about and deciding a particular constitutional issue.<sup>100</sup> We cannot make this kind of comparative assessment by judging the results of the different branches’ constitutional efforts, of course, since that would simply reintroduce the problem of finding the right “benchmark” for a “correct” constitutional decision. Instead, we must identify institutional features that are relevant to the capacity to make a particular kind of constitutional decision well and see which branch best embodies that set of features. That is what I propose to do here, to the extent that evaluative judgments are required.

In this Part, I focus on the basic question of Congress’s capacity to engage in constitutional deliberation and decisionmaking.<sup>101</sup> My argument so far has been only that judicial preemption doctrine presupposes that Congress has the capability to engage in deliberation about the constitutional permissibility of preemption. Now, the extreme level of deference to congressional judgments in this regard certainly suggests that courts are not concerned with evaluating the quality of Congress’s efforts. The doctrine’s only critical presupposition is that Congress is capable of making some kind of determination about the constitutional permissibility of preemptive

---

awareness of the threat of judicial review makes truly *congressional* constitutional determinations harder to identify. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 58–60 (1999); Mark Tushnet, *Evaluating Congressional Constitutional Interpretation* [hereinafter Tushnet, *Congressional Constitutional Interpretation*], in CONGRESS AND THE CONSTITUTION 269, 271–73 (Neal Devins & Keith E. Whittington, eds. 2005); see also *infra* notes 218–230 and accompanying text.

<sup>99</sup> See Garrett & Vermeule, *supra* note 91, at 1294; Tushnet, *supra* note 91, at 501.

<sup>100</sup> See Michael J. Gerhardt, *Judging Congress*, 89 B.U. L. REV. 525, 527 (2009).

<sup>101</sup> Jeffrey K. Tulis, *On Congress and Constitutional Responsibility*, 89 B.U. L. REV. 515, 518 (2009) (“To show that a legislature is capable of constitutional interpretation, one need not claim that all legislative interpretation is correct . . . Thus, a case for institutional capability in principle is less demanding than a case for institutional capability in fact.”).

actions. Indeed, if deference to Congress in preemption cases is constitutionally mandatory, the question of the relative quality of Congress's decisionmaking may simply be moot, at least from the judicial perspective.<sup>102</sup> The qualitative question may reenter the discussion if it turns out that deference to Congress in preemption cases is justified not by a constitutional requirement, but instead by the instrumental claim that Congress will perform relatively better than courts on the relevant constitutional questions. I thus give some attention to comparative qualitative assessment in the last section.<sup>103</sup>

It may seem relatively uncontroversial these days to claim that non-judicial actors, including members of Congress, are capable of meaningful constitutional deliberation and decisionmaking.<sup>104</sup> The legislative process seems to have what we might characterize as "built-in" opportunities for Congress to engage in constitutional deliberation: The numerous "vetogates" that ordinary legislation must survive before enactment provide opportunities for deliberation on constitutionality by individual members of Congress, congressional committees, and the entire House or Senate.<sup>105</sup> And evidence suggests that individual members and congressional committees do consider

---

<sup>102</sup> This might be so if Congress's preemption authority flows from the Necessary and Proper Clause—under the familiar doctrine of *McCulloch v. Maryland*, Congress alone may determine what constitutes a permissible exercise of that power. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); Gardbaum, *supra* note 3, at 781–82; *supra* notes 73–75.

<sup>103</sup> One thing on which I take no position is whether constitutional deliberation—or any other kind of deliberation, in Congress or any other institution—is intrinsically or instrumentally valuable in and of itself. Some argue that deliberation is a good in itself or maximizes social welfare. See, e.g., Barbara Sinclair, *Can Congress Be Trusted with the Constitution? The Effects of Incentives and Procedures*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 297. See generally Mathew D. McCubbins & Daniel B. Rodriguez, *When Does Deliberating Improve Decisionmaking?*, 15 J. CONTEMP. LEGAL ISSUES 9, 13–16 (2006) (reviewing literature on deliberation). But that view is contested. See *id.* at 17–18 (showing that under some conditions deliberation actually reduces social welfare). My claim here is only that congressional constitutional deliberation is anticipated by judicial preemption doctrine, that Congress has the capacity for such deliberation, and that, in some instances, including some instances involving preemption, Congress does deliberate about constitutional issues.

<sup>104</sup> See Neal Devins & Keith E. Whittington, *Introduction* to CONGRESS AND THE CONSTITUTION, *supra* note 98, at 5–7. See generally sources cited *infra* note 124. Congress's consideration of the constitutional scope of its impeachment authority during the Clinton scandal is often cited as an example. See Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 631 (1999); Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 994 (2008); Tushnet, *Congressional Constitutional Interpretation*, *supra* note 98, at 277–83; Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 89.

<sup>105</sup> See *infra* notes 126–131 and accompanying text.

constitutional issues on a relatively regular basis.<sup>106</sup> But constitutional deliberation and decisionmaking by Congress *as an institution* involves a number of complexities that need more extended consideration; and claims that Congress as a whole can and does engage in meaningful constitutional deliberation face some theoretical challenges. Judicial underenforcement of constitutional norms makes sense as a practice only if courts assume that Congress, in its formal, institutional actions, can and will identify, construe, and adhere to the judicially underenforced constitutional norms to their full conceptual limits.<sup>107</sup>

The presupposition of congressional capacity for constitutional deliberation is not a recent development in government: In addressing the first Congress in 1789, Madison emphasized that “it is incontrovertibly of as much importance to this branch of the Government as to any other, that the Constitution should be preserved entire. It is our duty.”<sup>108</sup> Though it is often left to the subtext in preemption cases, courts since *McCulloch v. Maryland* have repeatedly expressed the view that Congress is entitled—perhaps obligated—to interpret the Constitution.<sup>109</sup> For example, even as it struck down the Religious Freedom Restoration Act on the ground that Congress actually went too far in its constitutional deliberations by purporting to define the categories of discrimination prohibited by the Fourteenth Amendment, the Court nevertheless emphasized that, in general, “[w]hen Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution.”<sup>110</sup> As a practical matter today, judicial underenforcement and its corresponding assumption of congressional constitutional capacity seems entirely non-optional. The expansion of the federal administrative state has increased the volume of federal law and the speed of federal lawmaking far

---

<sup>106</sup> See Bruce G. Peabody, *Congressional Attitudes Toward Constitutional Interpretation*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 48–49 (reporting survey results showing that over half of the responding members of Congress said that constitutional issues influence votes); Whittington, *supra* note 104, at 105–06.

<sup>107</sup> See Sager, *supra* note 80, at 1221; see also Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1355–59 (2001) (noting that the “well-established practice of judicial deference to Congress . . . is rooted, at bottom, in the faith of Congress to make adequate constitutional judgments”); *supra* notes 73–90 and accompanying text.

<sup>108</sup> 1 ANNALS OF CONGRESS 500 (1789).

<sup>109</sup> See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); Katyal, *supra* note 107, at 1355–56; see, e.g., *Stuart v. Laird*, 5 U.S. (1 Cranch.) 299, 309 (1803) (deferring to congressional conclusion that the 1789 Judiciary Act was constitutionally permissible); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 352 (1816) (relying, for elaboration of constitutional norms, on a “foundation of authority” consisting of “judicial decisions of the supreme court” as well as “contemporaneous exposition” by Congress).

<sup>110</sup> *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

beyond judicial capacity for comprehensive constitutional oversight.<sup>111</sup> “So,” Garrett and Vermeule note, “it is unsurprising that the Supreme Court has itself retreated from judicial review of many types of congressional decisions,” including, among others, economic regulation, spending, delegation of regulatory authority to agencies and the balance of war and foreign affairs powers between the political branches.<sup>112</sup> These are areas in which courts either decline judicial review entirely by declaring issues non-justiciable, or apply standards of review so deeply deferential to Congress that they amount to about the same thing as no judicial review at all.<sup>113</sup> In other words, these are areas in which Congress rather than the judiciary has the *de jure* or *de facto* final constitutional say.<sup>114</sup>

If I am right that judicial preemption doctrine systematically underenforces the constitutional norms governing preemption, then it, too, assumes that Congress has the capacity to identify and abide by the relevant constitutional norms. This distinguishes preemption from some other constitutional questions—such as the interpretive question of whether discrimination against certain classes of people may violate the Equal Protection Clause—on which the Court has expressly *repudiated* congressional authority.<sup>115</sup> Of course, interpretive *capacity* and interpretive *authority* are two different things that are not necessarily (conceptually) connected. Capacity does not entail authority, and a lack of exclusive or ultimate authority does not deny capacity.<sup>116</sup> Courts might universally acknowledge that Congress has interpretive capacity while claiming ultimate

---

<sup>111</sup> See NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 251–53 (1994); Garrett & Vermeule, *supra* note 91, at 1282–83.

<sup>112</sup> See Garrett & Vermeule, *supra* note 91, at 1284–85.

<sup>113</sup> See *id.* at 1285; KOMESAR, *supra* note 111, at 253–54; ADRIAN VERMEULE, MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN WRIT SMALL 217 (2007); see H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 379 (1998) (reviewing DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801 (1997)). Professor Powell argues that “explicit norms of judicial restraint designed to avoid excessive interference with the democratic process . . . are norms of underenforcement” that “presume[ ] the need for enforcement of the fundamental law by the political branches.” *Id.*

<sup>114</sup> See KOMESAR, *supra* note 111, at 253–54.

<sup>115</sup> See, e.g., *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (rejecting congressional alteration of *Miranda* requirements because “Congress may not legislatively supersede our decisions interpreting and applying the Constitution”); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (rejecting Americans with Disabilities Act provision purporting to authorize private money damages actions against state governments as an illicit congressional attempt to expand its power under § 5 of the Fourteenth Amendment).

<sup>116</sup> See Gerhard, *supra* note 101, at 526, 529–30.

interpretive authority exclusively for themselves. But preemption decisions lack the rhetoric of judicial interpretive primacy that is present in, say, decisions involving Congress's authority under Section Five of the Fourteenth Amendment.<sup>117</sup> Quite the contrary: The deep deference afforded Congress on preemption suggests an implicit trust in Congress's ability to appreciate and abide by its constitutional obligations. There is a strong normative case for Congress being obligated to do just that, in every context.<sup>118</sup> But neither a congressional obligation to deliberate about the Constitution nor judicial assumptions that Congress does so guarantees that Congress actually can and will engage in constitutional deliberation.

Before considering the challenges to Congress's capacity for constitutional deliberation, and decisionmaking, we need to make some additional distinctions. We need to distinguish the question of Congress's "bare" capacity for constitutional interpretation—which is a question about Congress's institutional characteristics—from the question of Congress's *propensity* to engage in constitutional interpretation—which is a distinct question about Congress's actual behavior. We also need to distinguish the question of the discoverability of Congress's constitutional views, which is a question about whether—regardless of capacity in principle or performance in practice—Congress's constitutional decisionmaking is recorded in a way that allows us to identify and understand it. And finally, we need to distinguish the question of the *quality* of Congress's constitutional handiwork—the evaluative question I mentioned—which we can only answer after we have some evidence of congressional constitutional decisionmaking.

There are theoretical challenges to Congress's "bare" capacity for constitutional deliberation. Congress is a political institution: members of Congress are politicians, not judges. And politicians, as is well known, act for a variety of reasons other than the desire to interpret and abide by constitutional norms. By extension, we might expect the best causal accounts of Congress's institutional actions to be dominated by factors other than constitutional fidelity, dedication to the rule of law, or similar motives. Congress is often caricatured as "a great auction house, in which legislation is sold to those narrowly focused, rent-seeking interest groups that channel

---

<sup>117</sup> See, e.g., *City of Boerne*, 521 U.S. at 519 (rejecting "the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States" and holding that Congress "has been given the power to enforce, not the power to determine what constitutes a constitutional violation.") (internal quotation marks, brackets, and citation omitted).

<sup>118</sup> See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 587–88 (1975).

the most money into legislators' campaign coffers."<sup>119</sup> We need to know, then, whether Congress has institutional features which, in principle, enhance the probability that legislators will engage in serious deliberation about constitutional issues and that such deliberations will generate legislative actions consistent with legislators' constitutional conclusions.

A second set of challenges relates to how Congress is likely to perform in practice. It is clear that in some instances Congress does not seriously consider the constitutional bases for its actions.<sup>120</sup> For example, Congress made no findings relating gun possession to interstate commerce in passing the 1990 Gun Free School Zones Act (GFSZA).<sup>121</sup> Only after the Supreme Court granted certiorari in the *Lopez* case, when Congress "recognize[ed] that is handiwork was on the line," did Congress (perfunctorily) add the constitutionally relevant finding to the statute.<sup>122</sup> But, again, current judicial doctrine, in requiring deference to Congress in all preemption cases, assumes that Congress will take seriously the task of constitutional interpretation about preemption. Therefore, we need to know whether Congress's capacity to seriously and independently consider and act according to the constitutional norms governing preemption is undercut by pragmatic obstacles.

The project of *identifying* congressional constitutional views or determinations presents other challenges. Congress is a complex institution; national legislation is considered and enacted in a complex process. And since Congress is composed of numerous individual legislators, committees, subcommittees, and other formal and informal work-groups, each with potentially differing constitutional views, we might rightly question whether it even makes conceptual sense to talk about *Congress's* constitutional views. Even if it does make sense, we still need to know how Congress's constitutional views, in particular, may be accessed. Assuming the idea of a "congressional constitutional view" or a "congressional constitutional determination" makes sense, Congress's constitutional decisionmaking necessarily will differ from the model of judicial interpretation. Congress

---

<sup>119</sup> John C. Yoo, *Lawyers in Congress*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 132.

<sup>120</sup> See, e.g., Sinclair, *supra* note 103, at 301 (arguing that the new Republican majority in the 104th Congress often failed to meaningfully deliberate about proposed legislation in its push to make good on the "Contract with America").

<sup>121</sup> See J. MITCHELL PICKERILL, CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM 98–103 (2004); Neal Devins, *Congressional Fact Finding and the Scope of Judicial Review*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 230–31. The GFSZA was enacted in the Crime Control Act of 1990, Pub. L. No. 101-647, § 1702(b)(1) (amending 18 U.S.C. § 922).

<sup>122</sup> See *United States v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *cert. granted*, 511 U.S. 1029 (1994); Devins, *supra* note 122, at 230–31; see also Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904(2) (adding findings).



does not supply written justifications for its actions right along with every action it takes; and congressional actions that have a bearing on Congress's views about the Constitution can take a variety of different forms—everything from individual legislators' arguments, committee voting, the issuance of committee reports, and floor debate to the text of enacted resolutions and statutes.<sup>123</sup> So the task of piecing together a congressional constitutional interpretation supporting a given action will be one of, well, piecing together. Information about Congress's constitutional views will come from a number of different sources, and those sources will vary in reliability and comprehensiveness. I address these and other evidentiary issues in Part IV.

A final set of challenges relates to evaluating Congress's performance in constitutional deliberation and decisionmaking. Again, under-enforcing judicial doctrines like preemption doctrine most often are justified by instrumental claims about comparative institutional capacity. Congress is better situated to determine its constitutional obligations in this context, the argument runs, so courts should defer to Congress's judgments in this set of cases. This kind of instrumental justification requires, in addition to reasons for believing that the relevant non-judicial actor will identify and act in accordance with its constitutional obligations, further reasons for believing that the non-judicial actor will do a *better* job of either identifying or abiding by relevant constitutional norms on its own than it would do under a regime of judicial identification and enforcement. This does not require that the constitutional norm be an actual cause of conforming non-judicial action—that would ignore the complexity inherent in describing the causes of governmental action, especially actions of participatory institutions like Congress. Such institutions' actions usually involve multiple causal factors and isolating the primary one will be impossible in many cases. Instead, under-enforcement may be justified if it is reasonable to expect conforming action regardless of causation. A record of congressional action generally consistent with the constitutional norms governing preemption—perhaps as identified and construed by Congress—will help justify the rule. After surveying one category of evidence relevant to Congress's constitutional views about preemption, I conclude Part IV with some thoughts on how evaluation of Congress's constitutional handiwork might proceed.

---

<sup>123</sup> See *infra* Part IV.A. See generally KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999); Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713 (2008); Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573 (2008); Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408 (2007).

## B. Bare Congressional Capacity

Analysis of the institutional features of Congress supporting its basic capacity for constitutional deliberation and decision making occupies a rich and ever-growing literature; my survey necessarily will be brief and will focus on issues that I think are particularly relevant to preemption.<sup>124</sup> The sheer volume of scholarly attention to the subject casts doubt on any claim that congressional constitutional interpretation is, in fact, a non-subject. Given the weight of historical, judicial, and academic allegiance to the idea and our deep normative and structural investment in it, opponents of Congress's capacity for constitutional interpretation would appear to bear a relatively heavy burden of proof. Nevertheless, there remain some generalized critiques of Congress's bare capacity for constitutional deliberation. Judge Mikva's critique, for example, emphasized structural deficiencies limiting the time and resources available to members of Congress to seriously consider constitutional issues.<sup>125</sup>

---

<sup>124</sup> Lee Epstein gives a partial bibliography. See Lee Epstein, "Who Shall Interpret the Constitution?", 84 TEX. L. REV. 1307, 1307–08, nn.4–10 (2006) (reviewing CONGRESS AND THE CONSTITUTION (Neal Devins & Keith E. Whittington eds.) (2005)). For some of Epstein's suggestions and a few others, see generally LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT (4th ed. 1997) (1978) [hereinafter FISHER, CONFLICTS]; LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS (1988) [hereinafter FISHER, DIALOGUES]; LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); DONALD G. MORGAN, CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY (1966); WALTER F. MURPHY, CONGRESS AND THE COURT (1962); Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985) [hereinafter Fisher, *Interpretation*]; Abner J. Mikva, *How Well Does Congress Support and Defend the Constitution?*, 61 N.C. L. REV. 587, 590 (1983) (citing 128 CONG. REC. S2581 (daily ed. Mar. 23, 1982) (statement of Sen. Schmitt)); Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 401 (1986); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003). The idea is not new. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893) (arguing that Congress should be the principal constitutional interpreter in the American system). Substantial academic symposia devoted to congressional constitutional interpretation crop up regularly these days. See, e.g., Neal Devins, *Foreword*, 56 L. & CONTEMP. PROBS. 1 (1993) (introducing symposium, *Elected Branch Influences in Constitutional Decisionmaking*); Editors' Foreword, *Symposium: The Most Disparaged Branch: The Role of Congress in the Twenty-First Century*, 89 B.U. L. REV. 331, 331–32 (2009) (introducing the symposium by the same name, which had, as a principal topic, "Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?"); Robert A. Katzmann, Foreword, *Congress and the Constitution*, 50 DUKE L.J. 1165, 1165–69 (2001) (introducing symposium by the same name).

<sup>125</sup> See Mikva, *supra* note 124, at 590.

It is difficult to deny that Congress has all the institutional resources necessary for meaningful constitutional deliberation and decisionmaking.<sup>126</sup> First, members of Congress have a variety of forums in which they may identify and act on constitutional concerns: individual members positioned at key “vetogates” in the legislative process may take actions that affect legislative outcomes on constitutional grounds; and groups of members may discuss and debate constitutional issues in informal settings—committees, subcommittees and other more formal work-groups—and even on the floor of the House or Senate.<sup>127</sup> Second, Congress has extensive resources to provide information about the existence and substance of constitutional issues: the information necessary for timely and informed congressional constitutional deliberation may come from in-house resources like committee experts, staff counsel, and staff agencies and from external sources like interest groups, the federal Executive, courts, and even state governments.<sup>128</sup>

---

<sup>126</sup> This is not to say that Congress’s institutional resources could not be improved. See, e.g., Garrett & Vermeule, *supra* note 91, at 1297–303.

<sup>127</sup> On vetogates, see generally Eskridge, *supra* note 12, at 1444–46 (noting that legislation can be buried on constitutional grounds by committee chairs, the House Rules Committee, and individual filibustering Senators, among others). On committees, see generally 111TH CONG., LIST OF STANDING COMMITTEES AND SELECT COMMITTEES AND THEIR SUBCOMMITTEES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES TOGETHER WITH JOINT COMMITTEES OF THE CONGRESS WITH AN ALPHABETICAL LIST OF THE MEMBERS AND THEIR COMMITTEE ASSIGNMENTS, available at [http://clerk.house.gov/committee\\_info/scsoal.pdf](http://clerk.house.gov/committee_info/scsoal.pdf) (last visited July 17, 2009); United States Senate, *Committees*, available at [http://www.senate.gov/pagelayout/committees/d\\_three\\_sections\\_with\\_tasers/committees\\_home.htm](http://www.senate.gov/pagelayout/committees/d_three_sections_with_tasers/committees_home.htm) (last visited July 17, 2009); see also Roger H. Davidson, *The Lawmaking Congress*, 56 LAW & CONTEMP. PROBS. 99, 111–12 (1993) (discussing the complexity of the committee system); Sinclair, *supra* note 103, at 298 (describing committee process and noting that “Congress’s claim to competence at fact finding and deliberation is generally thought to rest on its standing committee system”); Whittington, *supra* note 104, at 87–88 (arguing that “an adequate picture of congressional efforts to interpret and implement the Constitution will have to take into account the normal work of the committees”). For examples of constitutional floor debate, see Davidson, *supra*, at 113 (citing the “House and Senate floor debate” over the proper congressional response to *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the Supreme Court upheld against First Amendment challenge air force regulations prohibiting Orthodox Jews from wearing yarmulkes while on duty, as “impressive evidence that members of Congress are fully capable of considering constitutional rights”) (citation omitted); Fisher, *Interpretation*, *supra* note 124, at 719–22 (discussing floor debate about and ultimate rejection of a 1984 line-item veto bill on constitutional grounds). But see *infra* note 131. On other kinds of working groups in Congress, see Davidson, *supra*, at 111–12.

<sup>128</sup> On committee expertise, see Whittington, *supra* note 104, at 96–97; see also *infra* note 182 and accompanying text. On congressional staff agencies and counsel, see Fisher, *Interpretation*, *supra* note 125, at 729–30; Louis Fisher, *Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at

Third, Congress has the time to undertake constitutional deliberation: although Congress is incredibly busy and taking up constitutional issues will often, maybe always, trade off with time that could be spent pursuing other goals, it appears that members and groups within Congress sometimes are willing to make the necessary sacrifices.<sup>129</sup> Committees probably are the most important forum for constitutional deliberation and decisionmaking in Congress. Since committee proceedings are typically less time-pressured than, say, floor votes, members in committee have substantial opportunities to identify, access information about, and seriously consider constitutional issues.<sup>130</sup> While the Judiciary Committees are very important in this regard, a

---

75–81; Yoo, *supra* note 119, at 135. On information from interest groups, see PICKERILL, *supra* note 121, at 66; Garrett & Vermeule, *supra* note 91, at 1299–300; Michael J. Klarman, *Court, Congress, and Civil Rights*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 180–81; *infra* notes 254–81 and accompanying text. On information from the Federal Executive, see Fisher, *Interpretation*, *supra* note 124, at 729 (discussing an earlier version of 28 U.S.C. § 530D, which requires the Department of Justice and other federal agencies to notify Congress of constitutional objections to implanting or enforcing federal legislation); Whittington, *supra* note 104, at 104–05; Eskridge, *supra* note 12, at 1446; Gerhardt, *supra* note 100, at 530; Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307, 322, 323 tbl.1 (2006). On information from courts, see PICKERILL, *supra* note 121, at 147; Tushnet, *supra* note 91, at 271–73; *infra* notes 219–31 and accompanying text; see also Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 117–18 (2001) (discussing informal sources of information); On the ways that state governments and their representatives may provide information about constitutional issues to Congress, see *infra* Part III.C.

<sup>129</sup> See Davidson, *supra* note 127, at 103–05 (describing Congress’s workload and the time tradeoffs involved in congressional constitutional deliberation); Garrett & Vermeule, *supra* note 91, at 1304 (highlighting the need to balance calls for congressional constitutional deliberation against “the need to enact legislation without undue delay or extreme difficulty”); Gerhardt, *supra* note 100, at 532–33 (observing that “the workload of members of Congress has exponentially increased over the last 160 years”).

<sup>130</sup> See, e.g., Davidson, *supra* note 127, at 100; Sinclair, *supra* note 103, at 298–02; Whittington, *supra* note 104, at 87. Committee reports are the primary source of information about constitutional issues for members in floor voting. See generally Philip P. Frickey & Steven S. Smith, *Judicial Review, the Congressional Process, and the Federalism Cases: An Interdisciplinary Critique*, 111 YALE L.J. 1707, 1737–38 (2002). While congressional precedents allow members to raise constitutional issues on the floor, even ones that were not considered by committees, such objections are often prospectively waived by special rules governing floor debate in the House and may be waived in advance by unanimous consent in the Senate. See Fisher, *Interpretation*, *supra* note 124, at 719; Frickey & Smith, *supra*, at 1738; Garrett & Vermeule, *supra* note 91, at 1300, 1328; Sinclair, *supra* note 103, at 303–04. For general critiques of the possibility of meaningful constitutional deliberation in congressional floor proceedings, see Frickey & Smith, *supra*, at 1738–44; Garrett & Vermeule, *supra* note 91, at 1304; Sinclair, *supra* note 103, at 303.

wide variety of other committees also engage in constitutional deliberations.<sup>131</sup>

I want to focus on a different kind of challenge, one that Mikva hints at in arguing that

[w]hile constitutional rhetoric occasionally finds its way into the legislative history of a statute and may even convince some members of Congress to act in a certain manner, for the most part the legislators are motivated by a desire to enact any particular piece of legislation that fills the perceived needs of the moment.<sup>132</sup>

This critique—made much more directly by others and, in my view, the one that we need to take most seriously—is based on a particular view of legislators’ motivations.

Much theoretical analysis of congressional behavior adopts a “rational choice” or “economic” approach for modeling legislative actions under which legislators are assumed always to act in the way they judge most likely to maximize their political support, chances of reelection, or some other measure of personal gain.<sup>133</sup> For most mainstream theorists this is “largely a methodological assumption, one dictated by the positivist aspiration of public choice to render testable predictions, which are unattainable without a precise maximand.”<sup>134</sup> In other words, for the specific purpose of predicting congressional behavior, it may be useful to assume that legislators will take what Macey calls the “political-support-maximizing” action in any given situation.<sup>135</sup> This kind of predictive, theoretical-model-building use of the rational choice assumption does not challenge the claim that legislators have

---

<sup>131</sup> The Judiciary Committees have generalized expertise in constitutional issues and conduct themselves in a relatively “court-like” manner. See PICKERILL, *supra* note 121, at 138; Whittington, *supra* note 104, at 96–97; see also *infra* notes 177–80 and accompanying text. Whittington’s study showed that while the Judiciary Committees account for over half of the committee hearings on constitutional issues held during the 1990s, a variety of different committees also relatively regularly held hearings on constitutional issues. See Whittington, *supra* note 104, at 97 & figs. 2–3.

<sup>132</sup> Mikva, *supra* note 124, at 606.

<sup>133</sup> See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public Choice Explanation of Federalism*, 76 VA. L. REV. 265, 269 (1990); William N. Eskridge, Jr., *Politics Without Romance: Implications of Public-Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 285 (1988).

<sup>134</sup> Garrett & Vermeule, *supra* note 91, at 1286; see also Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 4 (1991).

<sup>135</sup> See Macey, *supra* note 133, at 274. Some claim that public choice theory’s assumptions about legislative behavior are empirically false. E.g., Rubin, *supra* note 134, at 2 & n.3.

the capacity to, and do, act on motivations other than the desire to maximize personal gain.<sup>136</sup> But some “realist” arguments convert the rational choice *assumption* into the empirical *claim* that members of Congress actually do act only to maximize political support, to the exclusion of all other motivations.<sup>137</sup> On this view, as Garrett and Vermeule characterize it:

All legislative behavior . . . is rooted in relatively tangible forms of self-interest, such as the quests for money, fame, and power; realists typically ignore broader motives, such as personal satisfaction from justified accomplishment or the promotion of ideological goals. Some of this work even suggests that all constitutional discourse within legislatures (and maybe generally) is a sham, a cover for self-regarding motives and tactics.<sup>138</sup>

As a challenge to Congress’s institutional capacity for constitutional deliberation, I think the realist critique has a strong and a weak formulation. The strong realist claim would be something like: All members of congress always act based on calculations about which alternatives will maximize personal gain; deliberating about constitutional issues is never relevant to maximizing a member’s personal gain; thus, members will never engage in constitutional deliberation, and, thus, Congress as a whole lacks the capacity for constitutional deliberation. The weak realist claim would be something like: most members of Congress most of the time act based on calculations about which alternatives will maximize personal gain; deliberating about constitutional issues is rarely relevant to maximizing a member’s personal gain; therefore, members will rarely engage in constitutional deliberation and, therefore, Congress has very little capacity for constitutional deliberation. The strong realist claim is demonstrably false for several reasons. The response to the weak realist claim is more measured; there is undeniably some truth to it. But, I also think that it oversimplifies matters and thus paints an overly gloomy picture of congressional constitutional deliberation.

---

<sup>136</sup> See Garrett & Vermeule, *supra* note 91, at 1286, 1287 & n.39; Rubin, *supra* note 134, at 3.

<sup>137</sup> Garrett & Vermeule, *supra* note 91, at 1287 & nn.39–40 (noting arguments that “share a common atmospheric that describes legislators as maximizing personal gain in a crudely venal sense” and citing, as an example, Ian Shapiro, *Enough of Deliberation: Politics Is About Interests and Power*, in *DELIBERATIVE POLITICS: ESSAYS ON DEMOCRACY AND DISAGREEMENT* 28 (Stephen Macedo ed., 1999)); see also Rubin, *supra* note 134, at 4.

<sup>138</sup> Garrett & Vermeule, *supra* note 91, at 1287.

### 1. *The Strong Realist Critique*

The first problem with the strong realist claim against congressional constitutional capacity is that there appear to be decisive counterexamples. There are historical examples of serious and substantial debates about constitutional meaning and interpretation in Congress, as described in detail in David Currie's series on *The Constitution in Congress*.<sup>139</sup> Early congresses debated a "breathtaking variety of constitutional issues great and small," including, for example: the permissibility of congressional control over the federal judiciary; the scope of presidential and congressional foreign affairs and war powers; and the permissibility of delegating lawmaking authority to executive agencies.<sup>140</sup> More directly relevant to preemption, early congresses debated the effects of expanding or constricting national regulatory authority on state regulatory power and the extent to which the national government may commandeer state regulatory resources to carry out national programs.<sup>141</sup>

This reduces the strong realist claim against congressional constitutional capacity, at best, to a claim about our modern Congress. It is true that the congressional process has changed over the years and modern congressional records are not as marbled with constitutional discourse as those of early congresses.<sup>142</sup> Nevertheless, there appear to be modern counterexamples, too.

---

<sup>139</sup> See, e.g., DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS & WHIGS, 1829–1861* (2005) [hereinafter CURRIE, WHIGS]; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DESCENT INTO THE MAELSTROM, 1829–1861* (2005) [hereinafter CURRIE, MAELSTROM]; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997) [hereinafter CURRIE, FEDERALIST PERIOD]; DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE JEFFERSONIANS, 1801–1829* (2001) [hereinafter CURRIE, JEFFERSONIANS]; David P. Currie, *Prolegomena for a Sampler: Extrajudicial Interpretation of the Constitution, 1789–1861*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 18, 22 [hereinafter Currie, *Sampler*].

<sup>140</sup> CURRIE, FEDERALIST PERIOD, *supra* note 139, at 296. For debates about control of federal courts, see, e.g., *id.* at 154–56; CURRIE, JEFFERSONIANS, *supra* note 139, at 14. For debates about foreign affairs and war powers, see, e.g., CURRIE, FEDERALIST PERIOD, *supra* note 139, at 174–80, 215–17; CURRIE, JEFFERSONIANS, *supra* note 139, at 123–30, 145–55. For debates about delegation, see, e.g., CURRIE, FEDERALIST PERIOD, *supra* note 139, at 146–50.

<sup>141</sup> For debates about the allocation of national and state regulatory authority, see, e.g., CURRIE, FEDERALIST PERIOD, *supra* note 139, at 56–60, 69, 72, 79, 150. For debates about commandeering, see, e.g., *id.* at 137–38, 228–29.

<sup>142</sup> On reasons for changes in the legislative process, see generally Barbara Sinclair, *Question: What's Wrong with Congress? Answer: It's a Democratic Legislature*, 89 B.U. L. REV. 387, 388–94 (2009). On specific changes, see Sinclair, *supra* note 103, at 298 (noting increased multiple committee referrals, committee bypass mechanisms, omnibus bills, summitry, restrictive rules in the House and filibuster threats in the Senate); see also Eskridge, *supra* note 12, at 1448, 1452–53. On constitutional discourse in records of

Michael Gerhardt highlights some examples of Congress's "constitutional activity" over just the last quarter-century, including impeachments of federal judges in the late 1980s; consideration of major reforms regarding unfunded mandates, health care, and welfare; responses to presidential signing statements; responses to the economic downturn; and, of course, consideration of a variety of constitutional issues related to the war on terror.<sup>143</sup> Congress's rather frequent responses to judicial decisions invalidating legislation on constitutional grounds are additional contemporary counterexamples.<sup>144</sup> There are, of course, countless other examples, historical and contemporary, discussed in the literature on congressional constitutional deliberation.<sup>145</sup>

Aside from the counterexamples, the first premise of the strong realist argument—the empirical claim that legislators always will act to maximize personal gain—appears to be false. If we define personal gain narrowly as legislators' interest in securing reelection, then the realist premise has been rebutted by studies of congressional behavior. For example, other motivations obviously will be more important to legislators for whom reelection is not a concern, either because they have already done everything necessary to secure it or because they enjoy sufficient "slack" in their electoral districts to make reelection relatively secure with little or no work. Surely these legislators do not simply stop acting; they will act on

---

modern congressional proceedings, see Martin S. Flaherty, *Post-Originalism*, 68 U. CHI. L. REV. 1089, 1093 (2001) (reviewing CURRIE, JEFFERSONIANS, *supra* note 139); Tulis, *supra* note 101, at 520.

<sup>143</sup> See Gerhardt, *supra* note 100, at 530–31.

<sup>144</sup> Congress responded in some form to sixty-two percent of the seventy-one Supreme Court decisions issued between the 1953 and 1996 terms striking down federal statutes on constitutional grounds. See PICKERILL, *supra* note 121, at 39–57, 42 tbl. 2.2.

<sup>145</sup> See generally *supra* note 124. See, e.g., Davidson, *supra* note 127, at 113–14 (documenting House and Senate floor debates over legislation circumventing *Goldman v. Weinberger*, 475 U.S. 503 (1986), in which the Supreme Court rejected a First Amendment challenge to an Air Force regulation forbidding an Orthodox Jew from wearing his yarmulke while in uniform); Powell, *supra* note 113, at 380–84 (describing congressional and executive constitutional debate over a provision of the 1996 National Defense Authorization Act). Another commonly cited example is Congress's continuing use of legislative vetoes despite *INS v. Chadha*, 462 U.S. 919, 928 (1983), which struck down the legislative veto as a violation of Article I's bicameralism and presentment requirements. See Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 288–91 (1993). Congress actually directly challenged the Court's constitutional reasoning in *Chadha* by passing a statute stating that the legislative veto was a permissible exercise of the Senate's rulemaking authority. See J. Mitchell Pickerill, *Congressional Responses to Judicial Review*, in CONGRESS AND THE CONSTITUTION, *supra* note 98, at 151, 161. According to Pickerill, though, most congressional responses to judicial review are deferential. See *infra* note 223.



motivations other than securing reelection.<sup>146</sup> But we need not confine ourselves to a subset of legislators: the best account of legislative behavior in general is that members of Congress “pursue a variety of ends simultaneously, trading goals off against one another and giving no goal overriding priority.”<sup>147</sup> Reelection is of course one motivation, often an important one.<sup>148</sup> And a narrow focus on the motivation to secure reelection may be the best working model we have for *predicting* legislative behavior.<sup>149</sup> But as far as correctly *describing* legislative behavior is concerned, studies show that legislators act for other reasons as well, including the desire to promote the public interest and enact good public policy, and that concerns for reelection will not always trump these other motivations.<sup>150</sup>

These other motivations seem likely to prompt legislators to consider constitutional issues for several reasons. First, many members of Congress are motivated in part by their ideological commitments, which, for some, might include some form of commitment to constitutionalism or constitutional fidelity, or to a position on a particular constitutional issue.<sup>151</sup> Moving to motivations that are more broadly-shared, Garrett and Vermeule assume that some legislators will be motivated to take constitutional debates seriously because they view constitutional arguments for or against a piece of legislation as an indicator of whether it is in the “public interest” or “good public policy.”<sup>152</sup> They might attend to constitutional issues for instrumental reasons: Sinclair argues that an interest in good public policy requires members to attempt to ensure that legislation is constitutionally permissible—if it ends up being struck down, after all, they will not have made any public policy at all.<sup>153</sup> But it could also be that members simply think that public policy, in order to be “good,” must be at least colorably

---

<sup>146</sup> See Garrett & Vermeule, *supra* note 91, at 1288–89.

<sup>147</sup> *Id.* at 1287–88; see Rubin, *supra* note 134, at 31–35; Sinclair, *supra* note 103, at 294–96.

<sup>148</sup> See Garrett & Vermeule, *supra* note 91, at 1288; Sinclair, *supra* note 103, at 296.

<sup>149</sup> See Rubin, *supra* note 134, at 31.

<sup>150</sup> See Garrett & Vermeule, *supra* note 91, at 1287–88 (citing studies confirming this view); see also RICHARD J. FENNO, JR., CONGRESSMEN IN COMMITTEES 13–14 (1973); PICKERILL, *supra* note 121, at 21; Rubin, *supra* note 134, at 35 & n.110, 38 & nn.122–25.

<sup>151</sup> See Rubin, *supra* note 134, at 33; see, e.g., PICKERILL, *supra* note 121, at 139–40 (noting some members with ideological commitments on Takings Clause issues).

<sup>152</sup> See Garrett & Vermeule, *supra* note 91, at 1288 (internal quotations omitted).

<sup>153</sup> See Sinclair, *supra* note 103, at 295. Notably, on Sinclair’s view, the importance of *actual enactment* of legislation to interest groups makes considering the constitutionality of proposals instrumentally important even if legislators are solely motivated by reelection. See *id.*; cf. PICKERILL, *supra* note 121, at 28 (arguing that much constitutional deliberation in Congress will be “somewhat instrumental” because undertaken “primarily to avoid an adverse court ruling”).

constitutional. To be sure, Congress does not conduct deep debates about the constitutionality of legislative proposals as a matter of course in its day-to-day workings.<sup>154</sup> But if we accept either of the foregoing views about the relationship between constitutional considerations and legislators' interest in good public policy, then even simple votes in favor of legislative proposals can be taken as members' implicit conclusion that the measure is (at least arguably) constitutionally permissible.<sup>155</sup> On those rare occasions when Congress is squarely presented with a question of constitutional meaning—for example, when Congress considers responses to judicial rulings invalidating federal statutes on constitutional grounds<sup>156</sup>—a motive to make good public policy surely becomes a motive to do good constitutional deliberation.

Even if we accept *arguendo* the realist premise that legislators' actions are always self-interested, the second premise of the strong realist argument—that constitutional considerations will never be relevant to maximizing legislator "personal gain" or "self interest"—also appears to be false. If this is a conceptual claim, it is obviously wrong. We could easily imagine a scenario in which a legislator's main political supporters are primarily concerned with the quality of the legislator's performance on constitutional issues. Thus participation in constitutional deliberation and action based on constitutional principle might be our hypothetical legislator's only way to maximize political and personal gain.<sup>157</sup> Even if we define "personal interest" solely as the interest in securing reelection—as some theorists do—<sup>158</sup> there is no conceptual inconsistency between that motivation and consideration of constitutional issues, again because it is not inconceivable that constituents may care about constitutional fidelity. If the

---

<sup>154</sup> See PICKERILL, *supra* note 121, at 27–28; Sinclair, *supra* note 103, at 309; see also Davidson, *supra* note 127, at 103; Garrett & Vermeule, *supra* note 91, at 1298. Eskridge notes that congressional committees, in fact, carefully monitor Supreme Court decisions. William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 338 (1991). But as Gerhardt and Pickerill point out, such decisions are rare. See PICKERILL, *supra* note 121, at 65; Gerhardt, *supra* note 100, at 533.

<sup>155</sup> Cf. Michael J. Gerhardt, *Non-Judicial Precedent*, 61 VAND. L. REV. 713, 738 (2008) (noting that "congressional voting on legislation obviously entails making policy choices, though it might often involve implicit judgments made by some members about the constitutionality of the legislation on which they are voting").

<sup>156</sup> See generally Pickerill, *supra* note 145, at 160–67.

<sup>157</sup> See Garrett & Vermeule, *supra* note 91, at 1288–89; cf. James B. Kau et al., *A General Equilibrium Model of Congressional Voting*, 97 Q.J. ECON. 271, 286–87 (1982); Rubin, *supra* note 134, at 21.

<sup>158</sup> See, e.g., MORRIS P. FIORINA, REPRESENTATIVES, ROLL CALLS, AND CONSTITUENCIES 35–38 (1974); DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 13–17 (2d ed. 1974).

premise is instead an empirical one—i.e. that there are no such constitutionally-oriented constituencies—it is both problematic in the light of the examples of congressional constitutional deliberation I have mentioned and, at best, unproved.<sup>159</sup> Now, Barbara Sinclair argues that if members are in fact solely motivated by reelection, then “they can be trusted with the Constitution only if constituents use conformity with the Constitution as a key criterion of electoral choice.”<sup>160</sup> This, on Sinclair’s view, is “a heroic assumption;” and even if some constituents do make voting decisions primarily based on a member’s record on constitutional issues, “that there are enough such voters to make a difference seems unlikely.”<sup>161</sup> Nevertheless, the evidence suggests that, for whatever reason, legislators do undertake constitutional deliberation in some instances.<sup>162</sup> Given Sinclair’s argument against the likelihood of constitutional consideration bolstering reelection chances, it would seem that the narrow premise that members act solely to secure reelection must be wrong. A broader premise—that members of Congress act solely to promote their self-interest, defined as a blend of interests in reelection and making good public policy—might be right; but, as I have argued, it fails to support the case against congressional constitutional capacity because consideration of constitutional issues sometimes will serve legislators’ self interest by allowing them to fulfill their public policy goals.

## 2. *The Weak Realist Critique*

One strategy for a realist to avoid these problems is to advance the weak claim rather than the strong claim—that is, to admit that members of Congress *sometimes* have motivations other than reelection or some narrow conception of self-interest and that constitutional considerations *sometimes* may be relevant to the pursuit of these broader goals. Thus, for example, Mikva concedes that while legislators seek to enact the legislation that “fills the perceived needs of the moment,” their “supporters can draw on the Constitution to bolster their case or to create the appearance of a reasonable decision.”<sup>163</sup> But the formulation of Mikva’s concession hints at the deeper concern here: Yes, there are reasons to think legislators will sometimes use

---

<sup>159</sup> The extent to which voters choose among candidates on ideological grounds is debated. See Rubin, *supra* note 134, at 21 n.65; see also PICKERILL, *supra* note 121, at 134–43.

<sup>160</sup> Sinclair, *supra* note 103, at 294.

<sup>161</sup> *Id.*; accord PICKERILL, *supra* note 121, at 134–35.

<sup>162</sup> See, e.g., FISHER, CONFLICTS, *supra* note 124, at 1–21; FISHER, DIALOGUES, *supra* note 124, at 231; PICKERILL, *supra* note 121, at 16–17; Peabody, *supra* note 106, at 40–41; Whittington, *supra* note 104, at 87–88. For examples of anecdotal evidence, see *supra* notes 139–145 and accompanying text.

<sup>163</sup> Mikva, *supra* note 124, at 606.

constitutional arguments instrumentally to advance broader policy goals, and that is a good thing because it helps to make the case for congressional constitutional capacity. But we may still wonder whether the fact that legislators often will have instrumental reasons for raising constitutional issues—that is, that often they will be putting the constitutional lipstick on the proverbial political pig—distinguishes their constitutional arguments as somehow inferior to “genuine” constitutional interpretation.<sup>164</sup>

This is the reason why the weak realist claim really should bother us. Despite conceding that Congress occasionally does engage in constitutional deliberation, the realist can still maintain that constitutional deliberation by members of Congress is too superficial or too strategic to be meaningful. Pickerill’s conclusion that constitutional considerations will typically take a backseat to legislators’ other interests suggests that constitutional arguments often will be made to advance policy goals or other strategic aims.<sup>165</sup> Now, the observation that constitutional arguments are advanced for strategic reasons, without more, does not entail that they must be of poor quality. Nevertheless, there are a couple of reasons why strategically motivated constitutional arguments might be troubling: We might think that constitutional debates initiated for strategic reasons, rather than for their own sake, often will turn out to be of low quality, meaning that we ought not to take congressional constitutional decisions seriously because they are likely to be poorly reasoned.<sup>166</sup> We also might think that where legislators make constitutional arguments for strategic reasons, their constitutional positions are more likely to change from one instance to another. This also might justify a claim that we ought not to take congressional constitutional decisionmaking seriously.

Luckily, whenever constitutional debates are initiated in Congress, there are several dynamics that pressure participants to make arguments of decent quality. The first set of pressures relates to the fact that legislators have an interest not just in winning any one particular debate but in being effective operators in Congress over time.<sup>167</sup> Thus, for example, we get “the civilizing force of hypocrisy”: Legislators are likely to resist taking constitutional positions that are “too transparently favorable to [their] own interests” in

---

<sup>164</sup> See Powell, *supra* note 113, at 380–84.

<sup>165</sup> See PICKERILL, *supra* note 121, at 64–65.

<sup>166</sup> See Powell, *supra* note 113, at 378–79 (noting that critics claim that constitutional arguments in Congress are “irretrievably hypocritical” and “invariably makeshifts entitled to no respect”).

<sup>167</sup> See *id.* at 384–85; *cf.* Gersen & Posner, *supra* note 123, at 589 (making the related point that, in the federal legislative process, “Congress and the President engage in repeated play extending indefinitely into the future,” which generates endogenous constraints on the conduct of each, like the cost to either actor of taking inconsistent actions that decrease their credibility in future interactions).

order to preserve their credibility, which is important both to their effectiveness in Congress and to their chances of reelection.<sup>168</sup> The same kind of consideration constrains legislators' freedom to change their constitutional positions to suit their political goals, since that kind of "flip-flopping" also diminishes credibility.<sup>169</sup> Or, legislators may value consistency in itself based on an ideological commitment.<sup>170</sup> In any case, regardless of their reasons for taking a constitutional position at Time One, there are incentives for legislators to adhere to the same position at Time Two. Another related source of pressure to make high-quality constitutional arguments in congressional debates is legislators' knowledge that their arguments, and Congress's resulting actions, often will create precedents with which they or their parties will have to grapple in the future.<sup>171</sup> Such legislative precedents may "take on a life of [their] own"—the motivations of the legislators involved in creating the precedent may have little influence on how it is subsequently understood.<sup>172</sup> This possibility would seem to create an incentive for legislators to think beyond their immediate political goals when participating in constitutional debates.

The "cultures" of different congressional committees—that is, the norms of conduct they impose on committee members—constitute another set of institutional constraints on the motivations of individual legislators.<sup>173</sup> Fenno describes three basic categories of committees—policy, power, and constituency/reelection—based on the apparent principal motivation for committee action. Policy committees focus on policy goals within their substantive jurisdictions, power committees attempt to expand the political influence for the committee and its members, and reelection committees allow members to focus on maximizing political support.<sup>174</sup> One widely-shared motivation is the drive to accumulate prestige within Congress; one main way this is accomplished is by obtaining assignment to prestigious

---

<sup>168</sup> Garrett & Vermeule, *supra* note 91, at 1289 (quoting Jon Elster, *Alchemies of the Mind: Transmutation and Misrepresentation*, 13 *LEGAL THEORY* 133, 176 (1997)).

<sup>169</sup> *See id.*; *see also* Powell, *supra* note 113, at 384–85.

<sup>170</sup> *See* Rubin, *supra* note 134, at 33–34.

<sup>171</sup> *See* Gerhardt, *supra* note 155, at 714–18. On legislators' knowledge of the potential for their decisions to become precedents, *see, e.g., id.* at 718 (noting that "then-Representative Bob Barr declared that 'the precedents we set in [the Clinton impeachment proceedings] will remain part and parcel of our legal system for years to come'").

<sup>172</sup> *Id.* at 757.

<sup>173</sup> *See* FENNO, *supra* note 150, at 15–46; Whittington, *supra* note 104, at 89–90, 90 n.5 (citing sources); Mark C. Miller, *Congressional Committees and the Federal Courts: A Neo-Institutional Perspective*, 45 *W. POL. Q.* 949, 952–53 (1992).

<sup>174</sup> FENNO, *supra* note 150, at 1. Fenno's categorization has been updated. *See* Miller, *supra* note 173, at 963. The point here is just that committee "cultural" norms are important constraints on the motivations of individual members of Congress. *See id.*

committees.<sup>175</sup> Thus, members have incentives to adhere to the norms of committee culture.

The likelihood that constitutional argument will be advanced for strategic reasons will vary depending on committee type, and the ways in which different committees respond to judicial decisions is a good proxy for the way those committees are likely to treat constitutional issues generally.<sup>176</sup> The judiciary committees, for example, are policy committees with a particular focus on legal matters; not surprisingly, they tend to take judicial decisions and congressional reactions to judicial decisions very seriously.<sup>177</sup> This observation about committee culture supports the general perception that the Judiciary Committees are the committees most likely to engage in serious constitutional deliberation.<sup>178</sup> And, it turns out that most constitutional deliberation in congressional committees does occur in the Judiciary Committees.<sup>179</sup> However, Keith Whittington has demonstrated that a wide variety of committees other than Judiciary hold hearings that are centrally focused on constitutional issues, which suggests that constitutional deliberation is not limited to Judiciary but instead occurs—less regularly, to be sure—in most congressional committees.<sup>180</sup> Preemption is an issue in a wide range of substantive policy areas; thus constitutional issues relating to preemption are likely to be considered by a variety of different committees. Many of these will be policy committees that lack Judiciary's legalistic focus; they may also be power or constituency committees.<sup>181</sup> Now outside

---

<sup>175</sup> See Miller, *supra* note 173, at 954.

<sup>176</sup> Cf. Whittington, *supra* note 104, at 90 (noting that different types of committees may display "systematic differences in attitudes" in their actions).

<sup>177</sup> See Miller, *supra* note 173, at 959–61; see also *supra* note 131; *infra* notes 227–229 and accompanying text.

<sup>178</sup> See, e.g., PICKERILL, *supra* note 121, at 138; Whittington, *supra* note 104, at 96–97.

<sup>179</sup> See Whittington, *supra* note 104, at 97–98, figs. 2–3. The Judiciary Committees' "reverence" for the courts points up a potential problem for the task of identifying congressional constitutional decisions: Tushnet calls it the problem of "judicial overhang." See Tushnet, *supra* note 98, at 271; *infra* notes 218–230 and accompanying text.

<sup>180</sup> See Whittington, *supra* note 104, at 97–98, figs. 2–3.

<sup>181</sup> See *id.* at 96–97 ("Although the Judiciary Committees can be expected to build up more general expertise in constitutional issues and are clearly more specifically interested in such issues, other committees have issue-specific expertise and subject-area jurisdiction that are surely relevant to serious discussion of some constitutional issues."). The institutional norms of "constituency" or "reelection" committees, of course, invite members to act like the "single minded seekers of reelection" emphasized in some realist work. We will want to view the constitutional arguments made in these committees with some additional suspicion, but, for the reasons given in this section and the next, we should not necessarily disregard them just because they are strategically motivated.

the Judiciary Committees, the risk that constitutional arguments will be made strategically to advance policy goals, maximize committee power, or maximize members' reelection chances would appear to increase. These committees are, after all, primarily motivated by goals other than good constitutional interpretation. But, as I argue here and the next section, strategically motivated argument in Congress does not fatally undercut our ability to identify Congress's constitutional decisions or interpretations.

The institutional norms of many non-Judiciary committees likely will influence members in three beneficial ways. First, they may broaden members' focus beyond mere reelection seeking onto policy-related goals with which constitutional deliberation may be more readily connected.<sup>182</sup> Second, because constitutional issues will be of secondary importance, and thus these committees are unlikely to select members based on their constitutional views, consideration of constitutional issues in these committees likely will be less polarized and thus perhaps more productive than it would be in a Judiciary Committee populated with constitutional specialists.<sup>183</sup> Third, because some committees view courts not as objects of deference but instead as competing policy makers, their constitutional decisions may avoid the problem of judicial overhang and thus be more readily characterized as "uniquely" congressional constitutional decisions.<sup>184</sup>

Yet another source of pressure in the legislative process is the fact that the strategic motivation for raising a constitutional issue in Congress may translate to a motivation to win the constitutional debate thus initiated. Often strategically motivated constitutional argument is advanced in order to help legislators achieve legislative results. Where that is so, their strategic interests generate an interest in making good constitutional arguments.<sup>185</sup> For example, constitutional issues often are raised in Congress by opponents of popular legislative proposals.<sup>186</sup> Even if the real source of their opposition is disagreement with the policy merits of the proposal and they have raised constitutional objections only as a potentially effective way to win, the

---

Differences in committee culture outside the Judiciary Committees may enhance the independence of congressional constitutional deliberation about preemption. *See infra* notes 218–230 and accompanying text.

<sup>182</sup> *See supra* notes 146–155 and accompanying text.

<sup>183</sup> *See* Garrett & Vermeule, *supra* note 91, at 1325–26.

<sup>184</sup> *See* Miller, *supra* note 173, at 957–58 (noting that the House Energy and Commerce Committee appears to view courts as “just another player in the political game” (quoting a Committee staff member)); Davidson, *supra* note 127, at 102 (similar); Miller, *supra* note 173, at 958 (discussing the House Energy and Commerce Committee’s quick and decisive move to circumvent a Supreme Court decision striking down its ban on dial-a-porn telephone services on First Amendment grounds).

<sup>185</sup> *See* Powell, *supra* note 113, at 384–85.

<sup>186</sup> *See* PICKERILL, *supra* note 121, at 66.

opponents have every incentive to make the best constitutional arguments available. And proponents of the contested measure, thus compelled to engage the constitutional issues, must make similarly persuasive arguments in response. The legislators on both sides are interested above all in the fate of the bill—whether or not it will become public policy (including whether or not, after passage, it will survive potential constitutional challenges in court). Shifting the debate to the constitutional merits just forces them to pursue those same interests using constitutional rather than policy arguments.<sup>187</sup> Of course, there are instances in which the political motivations of those who raise constitutional issues do not translate to a motivation to actually win the constitutional argument. A bill might be clearly unconstitutional under well-settled judicial doctrine, but public pressure might be intense enough to motivate legislators to enact it anyway.<sup>188</sup> Or, constitutional issues might be raised to add a precatory “gloss” to legislation—perhaps in an attempt to satisfy a “rational basis” or similarly lenient standard of judicial review—without anyone seriously pressing the constitutional case against enactment.<sup>189</sup> We may be able to identify these instances and disregard them.<sup>190</sup> The point here is not that strategic interests will always, or even often, motivate members to raise and deliberate about constitutional issues; rather, it is that strategic and constitutional interests may and sometimes do “line up”—the strategic reason for raising a constitutional issue may generate an interest in winning the constitutional debate. As Currie reminds us, “[p]olitical payoff, like a litigant’s retainer, can provide a powerful incentive to good argument.”<sup>191</sup>

The institutional norms and pressures that encourage Congress to take up constitutional issues and argue them well should make us wary of giving up the possibility of congressional constitutional interpretation too quickly to the realists. Even Morris Fiorina, a key figure in rational choice theory of congressional behavior, admits that, “[t]o a greater degree than behavioral political scientists have acknowledged, institutional arrangements shape individual incentives, which in turn affect behavior. Both formal institutions

---

<sup>187</sup> See Sinclair, *supra* note 103, at 296.

<sup>188</sup> See PICKERILL, *supra* note 121, at 65 (noting that under these circumstances some members vote for a bill “with a belief, or even hope, that the Court will strike the statue down”).

<sup>189</sup> Both Pickerill and Devins think Congress’s initial consideration of its constitutional authority to enact the Gun Free School Zones Act was superficial. See PICKERILL, *supra* note 121, at 101–03; Devins, *supra* note 120, at 230–31.

<sup>190</sup> See PICKERILL, *supra* note 121, at 65; see also Devins, *supra* note 122, at 237–38.

<sup>191</sup> Currie, *Sampler*, *supra* note 139, at 24.



and informal ones, such as custom or practice, are important.”<sup>192</sup> Importantly, institutional norms both constrain individuals’ actions and generate particularized motivations and goals that individuals might not otherwise pursue if they were not embedded in the institution.<sup>193</sup> “Institutions have a mission to the extent that they possess ‘an identifiable purpose or shared normative goal,’” and “[t]he development and maintenance of this shared normative goal distinguishes those within the institution from those outside of it and imposes a distinctive set of responsibilities and motivations on those who are integrated into the institution.”<sup>194</sup> Institutions may influence individual members’ conceptions of themselves, and thus their goals and motivations, “both by defining a set of values that individuals come to adopt and by creating a set of routines that individuals may follow.”<sup>195</sup>

This realization may help dispel what seems to be an inconsistency in descriptions of congressional constitutional deliberation. On the one hand, there is the interview evidence showing that individual members of Congress do not place much priority at all on constitutional issues.<sup>196</sup> On the other hand, there are the many examples of congressional constitutional deliberation collected by Currie, Gerhardt, and others;<sup>197</sup> as well as Keith Whittington’s study showing that a wide variety of congressional committees frequently hold formal hearings that are centrally concerned with constitutional issues.<sup>198</sup> The power of institutional norms to constrain individual members of Congress in the pursuit of their interests and to generate positive incentives for members to engage with constitutional issues is a plausible explanation for the oddity that Congress and its committees, in their collective capacities, seem to take up constitutional issues more often than individual members otherwise might care to.

---

<sup>192</sup> Morris P. Fiorina, *The Presidency and Congress: An Electoral Connection?*, in *THE PRESIDENCY AND THE POLITICAL SYSTEM*, 444 (Michael Nelson ed., 1990) (as quoted in Miller, *supra* note 173, at 949).

<sup>193</sup> See Michael J. Gerhardt, *The Limited Path Dependency of Precedent*, 7 U. PA. J. CONST. L. 903, 989–91 (2005).

<sup>194</sup> Keith E. Whittington, *Once More into the Breach: Post-Behavioralist Approaches to Judicial Politics*, 25 LAW & SOC. INQUIRY 601, 623 (2000) (as quoted in Gerhardt, *supra* note 193, at 989).

<sup>195</sup> Rogers M. Smith, *Political Jurisprudence, the “New Institutionalism,” and the Future of Public Law*, 82 AM. POL. SCI. REV. 89, 95 (1988) (as quoted in Gerhardt, *supra* note 193, at 989).

<sup>196</sup> See, e.g., PICKERILL, *supra* note 121, at 134–37.

<sup>197</sup> See *supra* notes 139–145 and accompanying text.

<sup>198</sup> See Whittington, *supra* note 104, at 96–99, figs. 2–3.

### 3. *Strategic Argument and the Institutional View*

Despite these arguments, there remains, at least for me, the nagging sense that there is a problem here. Strategically motivated constitutional argument—even if, in response to various pressures, it is of high quality—is just not disinterested in the way that we think constitutional deliberation should be. The participants still have their agendas; constitutional arguments still are only means to an end. While the claim that constitutional arguments in Congress may be strategically motivated does not deny the existence of Congress's capacity for disinterested constitutional deliberation in principle; if constitutional debate is always strategic in practice, then capacity in principle does not amount to much. So, one thing we might like to know is how often legislators do in fact advance constitutional arguments for strategic reasons. It is important to note that the concern is not limited to modern congresses—Currie candidly admits that much early constitutional deliberation likely was motivated in part by a desire for political gain.<sup>199</sup> In the modern context, Pickerill takes a decidedly dim view in claiming most constitutional argument in Congress will be strategic and that most of the time it will be reactive to the threat of judicial review.<sup>200</sup> Even Louis Fisher, who, like Currie, ardently defends Congress's capacity for constitutional deliberation, admits that “when members debate a constitutional issue it may be for purely tactical reasons.”<sup>201</sup> But none of these commentators are willing to deny Congress's general capacity for disinterested constitutional deliberation or to claim that *all* constitutional argument in Congress is strategically motivated—to the contrary, Currie insists that “legislators [do not], any more than judges, *always* consult only their own personal preferences or self-interest; there are plenty of examples of public officials who take seriously their oath to support the Constitution.”<sup>202</sup> Surely Currie is right; at least we should hope so. But the most we can safely say is that some constitutional arguments in Congress are not strategically motivated; we must admit that many are. We also must admit that, oftentimes, it will be very difficult to tell the difference.<sup>203</sup> We could probably construct a

---

<sup>199</sup> Currie, *Sampler*, *supra* note 139, at 24.

<sup>200</sup> See PICKERILL, *supra* note 121, at 8–9.

<sup>201</sup> Fisher, *Interpretation*, *supra* note 124, at 718.

<sup>202</sup> CURRIE, *FEDERALIST PERIOD*, *supra* note 139, at 121.

<sup>203</sup> See, e.g., Fisher, *Interpretation*, *supra* note 124, at 719–21 (recounting seemingly genuine, disinterested constitutional debate over a 1984 line-item veto proposal and noting that, while the proposal was defeated by constitutional point of order, “[i]t is impossible to determine which Senators debated the constitutional issue because it was the simplest way to defeat an amendment they opposed on policy grounds”); cf. Frickey & Smith, *supra* note 130, at 1730 (concluding that “there is no single positive

narrative that would tie any given legislator's constitutional argument to some strategic goal. Debunking that narrative would require clear proof of the legislator's actual motivations for action, which presents a deep problem indeed. In short, there does not seem to be an easy way around the problem of strategic constitutional argument in Congress.

But there is some consolation. First, an expectation of disinterested deliberation from Congress is probably unrealistic; Congress is, after all, a political institution. In that respect, Congress as an institution differs dramatically from courts. If we value a congressional role in constitutional interpretation, then we may have to accept that Congress's constitutional decision making will differ from judicial decision making because of the institutional differences. One obvious difference is the one I have highlighted: congressional deliberations will be more visibly motivated by political considerations. I emphasize the *visibility* of political motivations in Congress to set up the second point: judicial constitutional decision making is not really as disinterested as our ideals would have it, either.<sup>204</sup> Judges and Justices, like members of Congress, have policy preferences and strategic goals that they may advance by taking one position or another in constitutional debates; we rely for constraint on the institutional features of courts and the limitations imposed by judges' and Justices' need to be effective operators over time.<sup>205</sup> It is not surprising that we should need to do the same with Congress. Failing all else, even strategic constitutional argument is still in some sense constitutional argument, and some form of constitutional deliberation in Congress is better than none at all.<sup>206</sup>

Perhaps one way to avoid the problem is to think of Congress as an institution rather than focusing on individual members. After all, when we talk about Congress's constitutional decisions, it does seem that we use "Congress" to designate a governmental institution that produces rulings, like a court or agency, rather than a group of individuals taking sides on contentious issues based on their own particular set of views and motives.<sup>207</sup> In principle, the justification for judicial rules that under-enforce constitutional norms does not require that each member of Congress conform their conduct with the norms to their full conceptual limits (though they may

---

political theory of legislative decisionmaking;" instead "a variety of theories have emerged to address various aspects of legislative politics").

<sup>204</sup> See Epstein, *supra* note 124, at 1312 & n.40; see, e.g., LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10–11 (1988); JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 44–115 (2002).

<sup>205</sup> See Tushnet, *supra* note 104, at 288; Klarman, *supra* note 128, at 173–74.

<sup>206</sup> See PICKERILL, *supra* note 121, at 130.

<sup>207</sup> Cf. Gerhardt, *supra* note 100, at 531–33 (discussing the contrast between viewing Congress as a "they" or an "it" in assessing congressional constitutional interpretation).

arguably be bound to do that by their oath of office), only that the Congress, as an institution, do so.<sup>208</sup> This is the same kind of move that we make to avoid the legal realist challenge to judicial decision making and affirm that court decisions are based on legal reasons. We talk about the *court's* decision, not the “real” reasons why the individual judges or justices voted as they did.<sup>209</sup> Everyone surely recognizes that judicial decisions are not always causally determined by legal reasons alone; that realization tells us something about how to predict judicial decisions, but it does not tell us anything about which judicial decisions count as binding law in our legal system. Instead, the institutional process recognized as appropriate for issuing binding judicial decisions tells us which decisions we must regard as binding; when decisions are properly issued according to that process, they are law.<sup>210</sup> This is also the same kind of move the courts make to avoid their own institutional incapacity to properly ascertain the motives for legislation: they invoke the “familiar principle . . . that [courts] will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”<sup>211</sup> Indeed, there is a sense in which a granular, member-by-member account of constitutional decision making by multi-member institutions does not mean much: there just are no objectively right answers to many constitutional questions.<sup>212</sup> So it would be foolishly optimistic, maybe even downright wrong, to expect that “they” will be able to reach a consensus regarding constitutional meaning for most issues. And it would be perhaps fatally undermining to our conceptions of governmental legitimacy to think this way about what it means for a governmental institution to make a

---

<sup>208</sup> See *supra* notes 73–90 and accompanying text. On oaths, see Fisher, *Interpretation*, *supra* note 124, at 718–22.

<sup>209</sup> Cf. CURRIE, FEDERALIST PERIOD, *supra* note 139, at 121 (noting that “legal realism has not prevented us from taking the reasoning of judges seriously or from evaluating it on its own merits.”); Powell, *supra* note 113, at 378 (explaining that “Currie rejects the cynical conclusion that the constitutional discussion in the political branches was a meaningless façade” for the same reasons that he rejects the legal realist conclusion that judicial constitutional rhetoric is meaningless).

<sup>210</sup> See generally Brian R. Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261–79 (Dennis M. Patterson ed., 1996) (arguing that Hart decisively refuted any version of realism that amounted to “conceptual rule skepticism” and that legal realism is a theory of adjudication, not a theory of law).

<sup>211</sup> *United States v. O'Brien*, 391 U.S. 367, 383 (1968); see Brest, *supra* note 118, at 589 (arguing that this rule “emphasize[s] the evidentiary difficulties of ascertaining subjective intent and the futility of invalidating a law that can be reenacted with a rehearsed legislative history and survive review”).

<sup>212</sup> See CURRIE, FEDERALIST PERIOD, *supra* note 139, at 296; Powell, *supra* note 113, at 376–77.

constitutional decision.<sup>213</sup> Disagreement is to be expected.<sup>214</sup> Judicial dissents illustrate this fact about constitutional deliberation well enough. What matters is that the governmental institutions tasked with deciding contestable constitutional questions do so according to a legitimate decision-making process.

I am not suggesting that we simply ignore the fact that Congress is, in fact, a multi-member body that renders decisions based on a multi-member process of deliberation, debate, compromise, and differentially-motivated voting; that is an obvious and important feature of what Congress is and how it works, and we need to keep it in mind.<sup>215</sup> What I do think, though, is that analysis of congressional actions in terms of the actions and motivations of individual legislators is probably more useful for the project of predicting congressional behavior. In contrast, understanding the implications of the things that Congress has done (or might do) for the meaning of the Constitution—understanding “Congress’s” constitutional views or interpretations—is probably most fruitfully pursued by viewing Congress as a single institution rather than an aggregate of multiple actors.<sup>216</sup> Gerhardt stresses that “[s]omehow Congress manages to produce [constitutional] judgments,” and those judgments are “the very things we need to study if we are interested in refining our understanding of the institutional capacity of Congress to interpret the Constitution.”<sup>217</sup> And adopting the institutional perspective allows us to focus on the right targets—congressional outputs on constitutional questions.

### *C. Practical Obstacles and Aids*

Facts about Congress’s “bare” capacity for constitutional decision making, again, do not tell us much about what Congress will do in practice. But the practical realities have implications for the project of determining whether judicial under-enforcement of the constitutional norms governing preemption makes sense as a practice. As a descriptive matter, regardless of capacity in principle, serious problems with Congress’s ability to identify and abide by the constitutional norms governing preemption in practice may make identification of congressional views about those norms impossible.

---

<sup>213</sup> Cf. Gerhardt, *supra* note 193, at 990 (arguing that taking this kind of institutional view allows us to “[r]ecogniz[e] law, or precedent, as a conceptual system [and thus] facilitates recognition of the authority of the law and its potentially coercive power”).

<sup>214</sup> See Gerhardt, *supra* note 100, at 531.

<sup>215</sup> Cf. Frickey & Smith, *supra* note 130, at 1731 (“[T]reating Congress as a unitary actor that contemplates evidence and creates a legislative record is a convenient fiction, but it is only a fiction.”).

<sup>216</sup> See Gerhardt, *supra* note 100, at 531–33.

<sup>217</sup> *Id.* at 531.

And such problems may undermine either version of the justification for judicial underenforcement. If we think deference to Congress is constitutionally mandatory, decisive pragmatic objections to congressional capacity might make us reconsider our reasons for holding that view; after all, nonsensical constitutional requirements are probably, upon further reflection, non-requirements. And, of course, for underenforcement to be instrumentally justified, we have to show that pragmatic obstacles do not undercut the claim that Congress's institutional capacity is relatively better than that of the courts on constitutional questions about preemption.

One such pragmatic obstacle is judicial review itself, and for relatively intuitive reasons. Judicial decisions and doctrine may be an important source of information for congressional constitutional deliberation, but if we think that Congress is deferring to courts' constitutional views—either predictively or in revisiting legislation after a judicial decision—rather than formulating its own views, we should worry about counting anything Congress says under such conditions as *Congress's own* constitutional determinations.<sup>218</sup> This problem is probably most pronounced when Congress responds to a judicial decision by revising the statute that was subjected to judicial review. Intuitively, we would expect Congress to defer to judicial constitutional conclusions most of the time and that is, in fact, what we find.<sup>219</sup> But this does not present much of a problem in the preemption context. While Congress responds to judicial statutory construction decisions relatively regularly; it rarely responds to judicial decisions construing a statute's preemptive scope.<sup>220</sup> Thus congressional responses to judicial preemption

---

<sup>218</sup> On judicial review's informational role, see *supra* note 128 and accompanying text; PICKERILL, *supra* note 121, at 147, 151–52. On judicial review's potential to distort our view of Congress's constitutional determinations, see Tushnet, *supra* note 98, at 271. There is an important distinction between, on the one hand, congressional constitutional discourse distorted by—that is, merely responding to or adopting—judicial constitutional views and, on the other hand, constitutional argument motivated and accordingly biased by members' strategic interests. In the latter case, as I've argued, there are reasons why we might be able to identify “uniquely congressional” constitutional views even if the relevant constitutional discourse or actions of individual members are purely strategic. See *supra* Part III.B.3.

<sup>219</sup> See PICKERILL, *supra* note 121, at 39–57. Roderick Hills provides an example of this deference in Congress's response to a preemption decision. See Roderick M. Hills, Jr., *Against Preemption: How Federalism Can Improve the National Legislative Process*, 82 N.Y.U. L. REV. 1, at 39–53 (2007). There are, of course, examples of congressional defiance of judicial constitutional conclusions—the continued use of the legislative veto despite *Chadha* is one. See *supra* note 145. But these are exceptions to the norm of deference. See PICKERILL, *supra* note 121, at 18.

<sup>220</sup> On responses to statutory construction decisions, see PICKERILL, *supra* note 121, at 39–57, 151–53. On the lack of responses to preemption decisions, see generally Note, *New Evidence on the Presumption Against Preemption: An Empirical Study of*

decisions are unlikely to yield much valuable evidence of Congress's constitutional views about preemption.

The effects of judicial review on congressional constitutional decisionmaking are less clear in the pre-enactment—and thus pre-judicial review—phase of the legislative process. Tushnet suggests two possible effects, depending on the probability that the legislation under consideration eventually will be subjected to judicial review and the clarity of the potentially applicable judicial standards. First, where the results of judicial review are predictable, Congress might engage in “anticipatory obedience” by attempting to “adapt[] [legislation] to ensure that it will survive judicial scrutiny.”<sup>221</sup> This situation would suggest that constitutional decisions are more reflective of judicial than *congressional* constitutional conclusions. But even if the results of judicial review are not predictable, a strong possibility of judicial review nevertheless may affect Congress's constitutional decisionmaking, for example, by motivating Congress to leave the hard constitutional questions to the courts. Tushnet calls this effect “judicial overhang.”<sup>222</sup> Where there is only a low probability of judicial review, Congress may choose to ignore constitutional issues altogether.<sup>223</sup> Either this or “judicial overhang” may result in shoddy, pretextual constitutional decisionmaking in Congress.<sup>224</sup>

---

*Congressional Responses to Supreme Court Preemption Decisions*, 120 HARV. L. REV. 1604 (2007).

<sup>221</sup> Tushnet, *supra* note 98, at 271; see also PICKERILL, *supra* note 121, at 25.

<sup>222</sup> Tushnet, *supra* note 98, at 271–72; see PICKERILL, *supra* note 121, at 135–36.

<sup>223</sup> Pickerill argues that the threat of judicial review is an essential motivating factor for congressional constitutional deliberation. See PICKERILL, *supra* note 121, at 127. But Whittington's study of the prevalence of constitutional issues in congressional committee hearings suggests that judicial review may be a less important trigger for constitutional deliberation in Congress than we might think. See generally Whittington, *supra* note 104. Within his dataset of committee hearings about constitutional issues, Whittington found that only “[o]ne-fifth of the congressional hearings are accounted for by direct responses to the actions of the coordinate branches. Responses to judicial decisions constituted a larger proportion of those, at 13 percent of all the hearings in the sample, than did responses to executive action, at 8 percent.” *Id.* at 105; see also *id.* at 104 tbl. 3. Drawing conclusions about whether Congress, in fact, “engages in constitutional deliberation on its own initiative or rather is pushed to do so,” Whittington argues that “[t]hough the courts play into congressional constitutional deliberations, they do not appear to be an especially important driving force behind such deliberations, and judicial actions are only somewhat more important in raising constitutional issues in congressional hearings than are the actions of the executive branch.” *Id.* at 103, 105. The quality of congressional constitutional deliberations that are not either sparked by anticipation of judicial review or undertaken in response to judicial decisions is an open question; however, there seems little doubt that such deliberations do occur. See *id.* at 107.

<sup>224</sup> See Devins, *supra* note 121, at 230–31 (noting the shoddiness of the pre-enactment constitutional deliberation about the permissibility of the Gun Free School

But these effects seem less likely to occur in Congress's pre-enactment consideration of constitutional questions about the preemptive effects of proposed legislation. The only doctrinal rule that Congress can be sure courts will apply to a not-yet-judicially-construed statute is the rule of deference to congressional intent.<sup>225</sup> For obvious reasons, this minimizes the distorting effect of judicial overhang—there simply is no judicial limitation on preemption to which Congress might *ex ante* attempt to conform its enactments. In this sense, initial congressional consideration of preemption approaches Tushnet's ideal situation in which we may determine "how [Congress] would behave were [it] to have full responsibility for [its] actions."<sup>226</sup> Additionally, recall that judiciary committee members in general display far more deferential attitudes toward the judiciary than do members of other committees;<sup>227</sup> Bruce Peabody's study shows that this deferential

---

Zones Act and that "when enacting the [Gun Free School Zones Act] legislators knew that the Supreme Court's commerce clause jurisprudence did not require findings of fact and was otherwise extremely deferential"); PICKERILL, *supra* note 121, at 101–02 (similar); *id.* at 126–28 (arguing that, more generally, under the deferential pre-*Lopez* commerce clause doctrine, Congress was less likely to take constitutional deliberation about the scope of its commerce power seriously than it was after the Court tightened up the standard of review in *Lopez*); *see also supra* notes 121–122 and accompanying text.

<sup>225</sup> Recent preemption decisions hint that the Court wants to make the presumption against preemption applicable in all preemption cases, too. *See supra* note 5. But the presumption does not require that Congress say anything clearly in the statutory text, only that its preemptive intent be "clear," including clearly implicit in the structure and purposes of the statute. *See supra* notes 14–18 and accompanying text.

<sup>226</sup> *See* Tushnet, *supra* note 98, at 272, 289. It approaches, but does not embody, the ideal situation because judicial review of congressional determinations about the constitutional permissibility of preemption is not *impossible*—as I have mentioned, the Court has at least once hinted at the possibility of such review. *See supra* note 69. This distinguishes preemption from contexts, like impeachment, where Congress knows its constitutional decision-making is unreviewable. *See* Tushnet, *supra* note 98, at 272–73. But preemption is also different from contexts where there is no settled judicial doctrine, in which Congress has reason to be unsure about the reviewability of its determinations and the standards courts would apply. In such contexts—one of which, Tushnet points out, is the war powers context—Congress's constitutional deliberations may be distorted by the specter of the courts even if, ultimately, its decisions are properly considered unreviewable. *See id.* Preemption, by contrast, is a known quantity—courts have made clear that they will almost universally defer to congressional decisions about when and how much preemption is authorized. Congress's advance knowledge that judicial review will be deferential should have roughly the same purifying effect on congressional deliberation as knowledge of unreviewability.

<sup>227</sup> *See* Davidson, *supra* note 127, at 102–03; Whittington, *supra* note 104, at 90; *supra* notes 176–181 and accompanying text. It is important to note that, while the Judiciary Committees may generally attempt to conduct their proceedings in a "court-like" way, they may still attempt to circumvent judicial decisions, as they did in approving legislation designed to circumvent the Court's holding in *Texas v. Johnson* that



attitude is not characteristic of members in general.<sup>228</sup> We have seen that committees other than judiciary do take up constitutional issues relatively regularly; preemption in particular is likely to be discussed outside the judiciary committees, since it most often arises in the context of specific policy areas over which other committees likely will have jurisdiction.<sup>229</sup> Despite these qualifications, potential effects of judicial review are something we will want to keep in mind when examining evidence of congressional constitutional deliberation and decisionmaking.<sup>230</sup>

The picture of congressional practice is not all negative. The relationship between preemption and federalism, I think, is one thing that bolsters Congress's capacity and incentives to consider constitutional issues relevant to preemptive legislation. I have resisted speculating about the constitutional norm or norms that give Congress its preemptive authority; but it is clear enough that federalism norms are *relevant* to preemption; preemption negatively impacts the regulatory authority of state governments, and meaningful regulatory authority for state governments is central to promoting the underlying values of federalism—values associated with regulatory diversity<sup>231</sup> and the robust functioning of the political system.<sup>232</sup> As

---

flag burning was constitutionally protected speech. See Davidson, *supra* note 127, at 114; Miller, *supra* note 173, at 958.

<sup>228</sup> See Peabody, *supra* note 106, at 39, 48 tbl. 1.

<sup>229</sup> See Whittington, *supra* note 104, at 96–98; *supra* notes 176–181 and accompanying text.

<sup>230</sup> Cf. Gerhardt, *supra* note 100, at 533 (arguing that it is important “not to overstate the significance of the phenomenon that Professor Tushnet describes as ‘judicial overhang’” because “relatively little of the realm of constitutional activity in Congress is actually subjected to judicial review, and the relatively little that is subjected to judicial review is usually upheld”).

<sup>231</sup> Regulatory diversity is arguably valuable in itself insofar as it allows for governmental satisfaction of the varying preferences of different constituencies. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 139 (2001); Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's “Unsteady Path”: A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1467–68; Young, *Federalisms*, *supra* note 1, at 53–54. It is also considered instrumentally valuable in facilitating potentially beneficial policy experimentation: state and local governments can enact policies that their local constituencies desire but which are not yet desired nationally; such policy experiments can increase national awareness of beneficial policy alternatives, resulting in better policy overall. See Bednar & Eskridge, *supra*, at 1468–69; Young, *Federalisms*, *supra* note 1, at 54–55.

<sup>232</sup> States and local governments expand the number of available arenas for political participation, which is thought to be valuable in itself. See Andrej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism after Garcia*, 1985 SUP. CT. REV. 341, 400; Young, *Federalisms*, *supra* note 1, at 58–59. Federalism also fosters valuable political competition: states can “serve as critical rallying points” for popular opposition to national policies, Young, *Federalisms*, *supra* note 1, at 60; and help

Professor Young argues, “Just *having* state governments is not enough; those governments need to have meaningful things to *do*. Federalism cannot provide regulatory diversity unless states have autonomy to set divergent policies; state governments cannot provide fora for political participation and competition unless meaningful decisions are being made in those fora.”<sup>233</sup>

There are, famously, “political safeguards of federalism” built into the constitutionally-established structure and processes of the national government, particularly the national legislative process.<sup>234</sup> The traditional argument focuses on the states’ “crucial role in the selection and the composition of the national authority”—e.g., state participation in the Electoral College process; equal representation in the Senate (and, before the Seventeenth Amendment, selection of senators); and indirect influence on all national politicians through state control of national elections.<sup>235</sup> It should be obvious from what I have said about the complexity of legislative motivations that this simple picture of members of Congress as faithful agents of their states in the national legislative process cannot be right.<sup>236</sup> For example, legislators’ interests in securing reelection create incentives to deliver services to constituents in a visible manner so that they can take the credit; national politicians will want to provide national policies and thus are likely to view state governments as political competitors.<sup>237</sup> Additionally, federalism distorts institutions’ incentives at both levels of government by creating a sort of ongoing prisoner’s dilemma: Although the best overall results would come from both the national and state governments carefully adhering to the terms of the federal arrangement, because neither knows whether the other will do so over time, both have incentives to cheat.<sup>238</sup>

---

maintain the multi-party system “by ensuring that a party defeated at the national level can nonetheless exercise power in statehouses around the country.” *Id.* at 61; *see also* Bednar & Eskridge, *supra* note 231, at 1464.

<sup>233</sup> Young, *Federalisms*, *supra* note 1, at 52, 63; *see also* Young, *Two Cheers*, *supra* note 1, at 1369–70.

<sup>234</sup> *See generally* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). The Supreme Court endorsed Wechsler’s view in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 550–54 (1985).

<sup>235</sup> *See* Wechsler, *supra* note 234, at 546.

<sup>236</sup> *See, e.g.*, Baker & Young, *supra* note 231, at 113 & n.180; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 221 (2000).

<sup>237</sup> *See* Baker & Young, *supra* note 231, at 114; Kramer, *supra* note 236, at 223–24; *supra*, notes 133–138, 146–150 and accompanying text.

<sup>238</sup> *See* Bednar & Eskridge, *supra* note 231, at 1470–72. Congress has incentives to shift costs to state governments by doing things like imposing uniform national regulatory standards where state-by-state regulatory diversity actually would be more beneficial, or by commandeering state government institutions to implement national

Nevertheless, despite the expansion of national government authority and minimal judicial intervention on states' behalf, state governments remain viable governing institutions today.<sup>239</sup> Thus there remains, as Larry Kramer puts it, "the nagging sense so many people share that [the political safeguards theory] captures something real, that there *are* 'political safeguards of federalism' that reduce or eliminate the need for judicial oversight of Congress on behalf of the states."<sup>240</sup> Several factors might explain this. There are actors who are both motivated to protect the institutional interests of state governments and positioned to intervene at critical points in the national legislative process.<sup>241</sup> Though members of Congress will not always account for state interests in making their decisions, sometimes they will, especially where legislation would impose disproportionate burdens on particular states.<sup>242</sup> Both political parties and Congress's reliance on state government institutions to implement federal programs also may increase the visibility of state government interests in Congress.<sup>243</sup> Judicial clear statement rules like

---

programs. *See id.* at 1473–74. And states have incentives to "shirk" by generally accepting the benefits of national regulatory programs but declining to enforce national policies that they think inconsistent with their own interests, by engaging in protectionism, or by exporting costs onto other states. *See id.* at 1474; *see also* Baker & Young, *supra* note 231, at 117–21 (noting the problem of "horizontal aggrandizement").

<sup>239</sup> *See* Kramer, *supra* note 236, at 227, 233. On the lack of judicial intervention, *see id.* at 228–33. Of course, recent years have seen the Rehnquist Court's "federalist revival," but as Young has argued at length, those judicial interventions are in areas that are not particularly meaningful in terms of federalism's most important values because they have not curtailed Congress's ability to impinge on state regulatory authority. *See* Young, *Two Cheers*, *supra* note 1, at 1373–80; Young, *Federalisms*, *supra* note 1, at 130–60.

<sup>240</sup> Kramer, *supra* note 236, at 218–19, 233. Most agree on this. *See, e.g.,* Baker & Young, *supra* note 231, at 115–16; Bednar & Eskridge, *supra* note 231, at 1476–79; Clark, *supra* note 41, at 1324; Young, *Two Cheers*, *supra* note 1, at 1358.

<sup>241</sup> *See* Bednar & Eskridge, *supra* note 231, at 1477.

<sup>242</sup> *See id.* ("Nothing would be more lethal to a senator's career than the perception that the senator's state was always a loser in Washington politics"; thus "a senator will fight like a wildcat to protect the state against specially targeted harms."). Legislative proposals likely to trigger this kind of response include what Baker and Young characterize as attempts at "horizontal aggrandizement"—where politically powerful states seek national legislation that benefits them but disproportionately burdens or violates the policy preferences of other states. *See* Baker & Young, *supra* note 231, at 117–21.

<sup>243</sup> Political parties today are primarily concerned with winning seats; to succeed, "members of local, state, and national networks are encouraged, indeed expected, to work for the election of candidates at every level." This builds relationships between national and state officials that make for more open lines of communication and greater sensitivity to each others' interests. Kramer, *supra* note 236, at 278–79; *see also* Bednar & Eskridge, *supra* note 231, at 1479; *cf.* Baker & Young, *supra* note 231, at 115–16. On congressional reliance on state government implementation of federal programs, *see*

the congressional intent rule and the presumption against preemption may aid in notifying state-interest advocates about federalism concerns where Congress responds to them in the pre-enactment process. But these judicial rules only encourage clearer congressional engagement with the question of whether and what state law a given statute preempts, not with the antecedent question of whether preemption is constitutionally permissible at all.<sup>244</sup> More importantly, preemption's direct connection with core federalism values should motivate those already positioned to monitor pending legislative proposals—individual legislators and committees—to more intensely scrutinize potentially preemptive bills, and it should motivate other actors—state government officials, institutions, and lobby groups—to engage in congressional monitoring as well.

Thus despite changes in our understanding of the political and procedural safeguards of federalism, there do seem to be some means and opportunities more or less “built into” the national legislative process for those who care about the institutional interests of state governments to voice their concerns when those interests are threatened, as they are when Congress considers preemptive legislation.<sup>245</sup> There are two reasons to think that the deliberation about federalism may also include consideration of the question of the constitutional source of Congress's preemptive authority: First, federalism might just be that source. Federalism is about maintaining a balance of regulatory authority between the two levels of government, not just protecting states; if maintaining the proper balance means that Congress must have the authority to preempt, federalism arguably could be the constitutional norm that underwrites preemption.<sup>246</sup> Second, to the extent that constitutional federalism issues are raised as objections by state-interest minded opponents of preemptive legislation, it seems reasonable to assume that they will seek to

---

Bednar & Eskridge, *supra* note 231, at 1478–79; Kramer, *supra* note 236, at 283–84, 283 n.269; Catherine M. Sharkey, *Federalism Accountability: “Agency-Forcing” Measures*, 58 DUKE L.J. 2125, 2159 (2009). Because of their role in the implementation of national programs, state governments often are able to directly advocate for their interests by communicating with national administrators or members of Congress, testifying in committee hearings, or lobbying. See Bednar & Eskridge, *supra* note 231, at 1478; Kramer, *supra* note 236, at 283 n.268. On state governments' influence in federal administrative agencies, see Sharkey, *supra*, at 2158–63. On state government lobbying groups, see Kramer, *supra* note 236, at 284–85; Sharkey, *supra*, at 2161–63; *infra* notes 257–264 and accompanying text.

<sup>244</sup> See *supra* notes 14–18 and accompanying text. The presumption against preemption, in forcing Congress to make visible its preemptive intent, may also encourage greater congressional attention to the constitutional permissibility of preemption just by focusing Congress on the general subject of legislation's preemptive effect.

<sup>245</sup> See *supra* notes 231–233 and accompanying text.

<sup>246</sup> See *supra* notes 62–68 and accompanying text.

defeat the legislation on any ground. To do that, they might raise any constitutional objection they think might help them defeat the bill, perhaps including an objection relating to preemption's constitutional permissibility.<sup>247</sup> This should offset, to some degree, the pathologies of the federal legislative process that generally tend to decrease the likelihood of serious constitutional deliberation in Congress.

A third practical consideration is the influence of interest groups. The desire to respond to requests or pressure from interest groups is, of course, a motivation for legislators. Interest group influence might even motivate some constitutional argument in Congress. We have already seen that strategically motivated constitutional arguments are not necessarily disqualified from consideration as evidence of a congressional constitutional determination.<sup>248</sup> But arguments that are overwhelmingly strategically motivated, perhaps, should *not* qualify as evidence of Congress's views.<sup>249</sup> While in most cases it will be difficult to differentiate between "genuinely" and "strategically" motivated constitutional arguments in Congress; we may be able to at least determine whether congressional constitutional arguments about preemption are likely to be overwhelmingly motivated by the strategic interest in placating interest groups seeking legitimizing constitutional "gloss" for their legislative agenda items.<sup>250</sup> Moreover, Congress principally relies on a "fire alarm" model for having constitutional issues brought to its attention—generally, constitutional issues must be flagged by outside actors such as interest groups—and some think fire alarm monitoring works best when there are organized interest groups on both sides of an issue with clear lines of communication to legislators.<sup>251</sup> Therefore, a descriptive account of the balance of interest group participation on both sides of preemption issues may help us to assess the likelihood that constitutional deliberation about preemption will be initiated in Congress.

Preemptive legislation is unquestionably an arena of significant interest group influence.<sup>252</sup> Industries often are motivated to pursue uniform federal

---

<sup>247</sup> See *supra* notes 186–191 and accompanying text.

<sup>248</sup> See *supra* notes 199–217 and accompanying text.

<sup>249</sup> See Devins, *supra* note 121, at 221 (arguing that congressional constitutional fact-finding may be mere "recitation of special-interest preferences"); cf. Garrett & Vermeule, *supra* note 91, at 1325–26 (noting, in evaluating different options for a congressional committee to take the lead on constitutional issues, that "[t]he structure of interest-group activity and conflict is a crucial element in committee design").

<sup>250</sup> On distinguishing genuine and strategic arguments, see *supra* notes 199–203 and accompanying text.

<sup>251</sup> See Garrett & Vermeule, *supra* note 91, at 1300.

<sup>252</sup> Industry lobbies have aggressively promoted preemptive legislation relating to environmental protection, pensions, securities, and lending, among other things. See Hills, *supra* note 219, at 19–20. Some think that interest group influence is the dominant

regulation regardless of its stringency where the alternative is multiple potentially differing state-law regimes—in other words, they have incentives to pursue national regulatory uniformity for its own sake.<sup>253</sup> By contrast, policy-focused interest groups will support or oppose preemption based on their assessment of the policy benefits of state-by-state as opposed to national regulation.<sup>254</sup> Since they sometimes will *promote* preemption based on its potential to deliver the best regulatory outcome, they “lack the unifying interest in regulatory diversity for its own sake.”<sup>255</sup> This creates an “asymmetry” in the alignment of interests around preemptive legislation—pro-preemption groups will pressure Congress for preemption relatively regularly; opposition will be more sporadic.<sup>256</sup> A lack of consistent countervailing interest-group pressure against preemption would make it less likely that Congress will be alerted to, and thus deliberate about, relevant constitutional issues in considering preemptive legislation and more likely that such deliberation, when it does occur, will be one-sided and pandering rather than serious.

But focusing on policy lobbies omits a set of interest groups that, at least in principle, should *always* be motivated to protect the institutional prerogatives of state and local governments and thus should always have incentives to oppose preemption—state and local governments themselves.<sup>257</sup> The intergovernmental lobby is composed of more than sixty organizations representing state and local governments and government officials, the most important of which are the Council of State Governments, the International City Management Association, the Nation’s Association of Counties, the National Conference of State Legislatures, the National

---

force in shaping legislative outcomes generally. See Young, *Federalisms*, *supra* note 1, at 83 (citing, as an example of this view, Jonathan Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 229 (1986)). But this view has its detractors, too. See *id.* at 83 n.392 (citing DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTERPRETATION* 22–23 (1991)). Once again, the best account is that there is no single dominant motivation for legislators’ decisions. See *supra* notes 146–150 and accompanying text.

<sup>253</sup> See Hills, *supra* note 68, at 29–30.

<sup>254</sup> See *id.* at 31.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.* at 36; see *id.* at 31. Moreover, pro-preemption interest groups are likely to try to *reduce* the public visibility of Congress’s deliberations about preemption. See *id.* at 29–31, 34–35; see also Nina A. Mendelson, *A Presumption Against Agency Preemption*, 102 Nw. U. L. REV. 695, 709–10 (2008).

<sup>257</sup> See Mendelson, *supra* note 12, at 762–63; Sharkey, *supra* note 243, at 2158–63; Young, *Federalism Doctrine*, *supra* note 1, at 1779 & n.171. See generally JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* (2009).

Governors' Association, the National League of Cities, and the United States Conference of Mayors.<sup>258</sup> Since they are composed of officials from numerous states, these groups have an incentive to pursue policies that are beneficial from "all (or some critical number of) states' perspectives, rather than represent the unique (and perhaps idiosyncratic) interests of any one" state.<sup>259</sup> Thus these groups "have expressly supported the more abstract values of federalism," such as "the role of states as 'laboratories of democracy' and sources of 'innovation.'"<sup>260</sup> Some scholars appear to think intergovernmental lobby groups are not significantly influential in Congress;<sup>261</sup> others are more optimistic, to the point of worrying that intergovernmental lobbying groups may have disproportionate influence that might generate state-favoring legislative outcomes even when those outcomes are more problematic than alternatives.<sup>262</sup>

The truth probably lies somewhere in between. State government lobbies are probably most likely to seriously attempt to influence proposed legislation that would affect the most important state institutional interests.<sup>263</sup>

---

<sup>258</sup> See Garrett, *Federalism*, *supra* note 13, at 1506–07 (citing DAVID ARNOLD & JEREMY PLANT, *PUBLIC OFFICIAL ASSOCIATIONS AND STATE AND LOCAL GOVERNMENT* 1–14, 15 n.1 (1994)); Mendelson, *supra* note 12, at 762.

<sup>259</sup> Sharkey, *supra* note 243, at 2162.

<sup>260</sup> Mendelson, *supra* note 12, at 762 (citing *Federalism: Hearings Before the S. Comm. on Governmental Affairs*, 106th Cong. 5, 6, 22 (1999)).

<sup>261</sup> See Hills, *supra* note 219, at 31, 36.

<sup>262</sup> See Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1952 (2008); see also Baker & Young, *supra* note 231, at 117–21 (discussing "horizontal aggrandizement"); Garrett, *Enhancing*, *supra* note 13, at 1120–28; Kramer, *supra* note 236, at 284–85 (listing the intergovernmental lobby as an important part of the modern "political safeguards" of federalism and noting that its influence "is, in fact, widely acknowledged and respected in Washington"); Mendelson, *supra* note 12, at 762–66 (arguing that state lobbying groups probably are capable of offsetting the influence of pro-preemption interest groups (and other interest groups that seek federalism-denigrating legislation) in Congress).

<sup>263</sup> Neal Devins' study of legislation implicating federalism provides anecdotal support—he concludes that "Congress typically values federalism on issues in which states and local officials both disapprove of federal initiatives and work hard to make their voice heard." Devins, *supra* note 120, at 230. He found that Congress did not pay serious attention to federalism in enacting the Gun Free School Zones Act or the Religious Freedom Restoration Act. See *id.* at 230–31. This is not surprising: states were unlikely to take the politically unpopular positions of opposing national legislation prohibiting guns near schools or promoting religious freedom. See *United States v. Lopez*, 514 U.S. 549, 581 (1995) (Kennedy, J., concurring); Baker & Young, *supra* note 231, at 114 (noting that at the time Congress considered the GFSZA, 40 states had already enacted similar prohibitions); see Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 93, 99 (2000) (noting that no representatives of state interests were called to testify during Congress's consideration of

Preemption affects the most important such interest: states' capacity to deliver meaningful regulatory benefits to citizens. So, intergovernmental lobby groups should be centrally concerned to influence the content of preemptive legislation.<sup>264</sup> While some "casually empirical evidence found in the legal literature tentatively suggests that these [intergovernmental lobbying] groups have at least as much clout as other groups,"<sup>265</sup> the intergovernmental lobby's exact priorities, and how successful it can be on various issues, are subjects that require further study.<sup>266</sup> Still, it is at least clear that these interest groups have sufficient resources and motivation to dilute the influence of pro-preemption interests in Congress.<sup>267</sup> Thus we need

---

RFRA, "[n]or were states or state organizations brought into the drafting process"). States have been more active and successful in persuading Congress to attend to federalism issues when their budgets—obviously critical to their regulatory capacity—have been threatened. For example, when Congress was considering applying the wage and overtime provisions of the Fair Labor Standards Act to state governments, which would have required states to pay billions in overtime compensation, states successfully pressed Congress both to delay the effective date of the provisions for over a year and to amend the FLSA to allow states to provide compensatory time off rather than higher pay for overtime work. *See* Bednar & Eskridge, *supra* note 231, at 1476–77 (discussing compensatory time amendment); Devins, *supra* note 120, at 231–32 (discussing the delay); *see also* FLSA Amendments of 1985, Pub. L. No. 99-150, 99 Stat. 787. The intergovernmental lobby's influence in placing the issue of unfunded federal mandates on the legislative agenda and shaping the mandate reform legislation that resulted is further anecdotal evidence. *See* Garrett, *Federalism*, *supra* note 258, at 1507.

<sup>264</sup> *See* Young, *Federalisms*, *supra* note 1, at 63–65, 130–60; *supra* notes 231–233 and accompanying text.

<sup>265</sup> Bednar & Eskridge, *supra* note 231, at 1476 (citing Eskridge, *supra* note 154, at 359–72; Carol F. Lee, *The Political Safeguards of Federalism? Congressional Responses to Supreme Court Decisions on State and Local Liability*, 20 URB. LAW. 301 (1988)). Eskridge's study of congressional responses to Supreme Court decisions, for example, found that states were generally more successful than other groups in pushing for responses. *See* Eskridge, *supra* note 154, at 348–49; *see also* Frickey & Smith, *supra* note 130, at 1730 n.112. We should note that intergovernmental lobby groups are composed of or otherwise directly linked with the fates of state and local government officials, who are themselves politicians with all the typical political motivations; thus intergovernmental lobby groups themselves may be influenced by other interests that are less concerned about the electoral consequences of the policy positions they adopt. *See, e.g.*, Hamilton, *supra* note 263, at 100.

<sup>266</sup> *See* Frickey & Smith, *supra* note 130, at 1729–30; Sharkey, *supra* note 243, at 2163.

<sup>267</sup> *See* Galle & Seidenfeld, *supra* note 262, at 1952; Mendelson, *supra* note 12, at 762–63; *supra* notes 231–233 and accompanying text; *see, e.g.*, Sharkey, *supra* note 243, at 2150–52 (discussing, as an example, the efforts of intergovernmental lobby groups to influence Congress to change the preemptive scope of the 2005 REAL ID Act by, among other things, testifying before the Senate Judiciary Committee in hearings on preemption).



not be overly concerned that congressional constitutional discourse about preemption will be nothing more than repetition of pro-preemption interest group arguments. Intergovernmental lobby groups also have incentives to play a positive role in the process by bringing constitutional issues to Congress's attention and providing substantive information on those issues, thereby initiating and facilitating congressional constitutional deliberation about preemption that might otherwise not have occurred.

The existence and influence of intergovernmental lobby groups, along with members' built-in motivations to consider states' institutional interests, suggest that Congress's capacity for serious constitutional deliberation about preemption may be somewhat better than the legislative baseline. And, again, the focus here is on comparative institutional capacity: specifically, on comparing Congress's capacity with that of courts.<sup>268</sup> To be sure, intergovernmental lobby groups can and do voice their concerns in court;<sup>269</sup> but they have more and better opportunities to do so in Congress. First,

---

<sup>268</sup> This is not to argue that Congress is the federal institution in which state interests are *best* represented—though it is disputed, some claim that honorific goes to administrative agencies. Compare Galle & Seidenfeld, *supra* note 262, at 1948–83; Gillian E. Metzger, *Administrative Law as the New Federalism*, 57 DUKE L.J. 2023, 2080–82 (2008) (arguing, for various reasons, that administrative agencies better represent state interests than Congress); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449, 485–90 (2008); Sharkey, *supra* note 243, at 2146–55, with Eskridge, *supra* note 12, at 1455, 1455 n.56, 1457; Merrill, *supra* note 4, at 755–57; Mendelson, *supra* note 256, at 698 (expressing doubts, on various grounds, that agencies are the superior forum for expression of state interests). My only argument here is that state interests, particularly relating to preemption, are relatively better represented in Congress than in courts.

<sup>269</sup> The NAAG, for example, spends much of its time filing amicus briefs in cases implicating state interests. See Cornell W. Clayton, *Law, Politics, and the New Federalism: State Attorneys General as National Policymakers*, 56 REV. POL. 525, 548–52 (1994); Sharkey, *supra* note 243, at 2162. Anecdotal evidence suggests that intergovernmental lobby groups may be less inclined to oppose legislation in court after it is enacted, particularly when opposition would be politically costly. See Hamilton, *supra* note 263, at 99–100. Anticipation of such political costs and the difficulty of securing amendments to or repeals of enacted statutes would seem to generate incentives for intergovernmental lobby groups to focus their efforts on influencing legislation during pre-enactment congressional deliberations. On the difficulty of obtaining amendments, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 7 (1982) (it is generally harder to amend statutes than to enact them initially); cf. Eskridge, *supra* note 12, at 1453–55 (noting that “[i]f vetogates make statutes hard to enact, they make them doubly hard to repeal”); Young, *Two Cheers*, *supra* note 1, at 1389 (noting that under current doctrine “the burden of speaking clearly *ex ante* or, if necessary, overcoming legislative inertia to amend a statute *ex post* is born by the proponents of preemption”). On the difficulty of overcoming congressional inertia in general, see generally CALABRESI, *supra*, at 3, 80–82, 120–21. On the difficulty of getting Congress to legislatively circumvent judicial decisions, see generally PICKERILL, *supra* note 121.

unlike courts, members of Congress sometimes will have political incentives to prioritize the intergovernmental lobby's views, for all the reasons that they have incentives to prioritize state governments' institutional interests.<sup>270</sup> Second, while influencing a judicial decision is usually a one-shot deal, intergovernmental lobby groups have several opportunities to influence Congress's decisions in the multi-faceted national legislative process: They may have particular influence over individual members situated at critical "vetogates"; they may have special influence over particular committees or subcommittees; or they may influence committee proceedings generally through testimony or the provision of other information.<sup>271</sup> If Congress needs state governments to implement national legislation, the intergovernmental lobby's influence should be magnified because of its direct relationship with state governments.<sup>272</sup> So, too, intergovernmental lobbies may have special influence because their members and clients—state and local governments and government officials—are connected to national legislators through political parties.<sup>273</sup> And courts may be interested in federalism as a matter of constitutional principle—recent decisions from the Rehnquist court suggest this is so.<sup>274</sup> But as commentators have emphasized, courts' failure to attend to the effects of preemption on state interests suggests that judicial federalism jurisprudence lacks the proper focus.<sup>275</sup> Members of Congress have political incentives to take seriously issues that are of the most serious concern to state governments; courts lack such incentives.<sup>276</sup>

#### IV. EVIDENCE OF CONGRESS'S VIEW OF THE CONSTITUTIONAL NORMS GOVERNING PREEMPTION

The picture of Congress's general capacity for constitutional deliberation is mixed. While it is difficult to deny congressional constitutional capacity in principle; in practice, a number of variables must qualify our identification and assessment of congressional constitutional decisions. The arguments in Part III suggest that Congress should most often come out ahead of courts in terms of capacity for constitutional deliberation about the constitutional

---

<sup>270</sup> See *supra* notes 231–233, 2240–243 and accompanying text.

<sup>271</sup> See NUGENT, *supra* note 257, at 58–61; *supra* notes 126–131 and accompanying text.

<sup>272</sup> See *supra* notes 257–260 and accompanying text.

<sup>273</sup> See Bednar & Eskridge, *supra* note 231, at 1479–80; Kramer, *supra* note 236, at 278–79; *supra* note 243.

<sup>274</sup> See Young, *Federalisms*, *supra* note 1, at 2, 23–50.

<sup>275</sup> See *id.* at 130–34; Young, *Two Cheers*, *supra* note 1, at 1376–79.

<sup>276</sup> See Merrill, *supra* note 4, at 758. Congress, as compared to courts and administrative agencies, is "the institution in which the interests of the states . . . are probably best represented." *Id.* at 753.

norms governing preemption.<sup>277</sup> But we must bear in mind that constitutional questions about preemption, like questions about federalism, almost always will arise during consideration of a substantive policy proposal that some group of stakeholders wants implemented. And, as Professor Young notes, “the dynamics of institutional participation on the second-order [constitutional] question . . . might be quite different in a context involving a different underlying policy issue.”<sup>278</sup> So we can generalize a bit, but a decisive comparison of Congress’s and courts’ handling of constitutional questions about preemption will have to account for these institutions’ work at retail.<sup>279</sup> General considerations include the identity and motivations—strategic or otherwise—of the actor that initiates deliberation by alerting Congress to a constitutional issue; the motivations of individual participants in constitutional deliberations; the nature of the policy proposal at stake in those deliberations; constraints imposed by the forum in which deliberation occurs; the quantity and quality of substantive information generated; the committees involved, if any, and their institutional cultures; the array of interest groups exerting influence on the subject; whether the deliberations take place before or after judicial review, and, if before judicial review, whether the possibility of judicial review is a distorting factor. Thus the basic story on preemption is the same as for consideration of other constitutional issues in Congress: We can expect variation from case to case in the decisionmaking process, the stakeholders involved, and the quality of congressional argument and decisions. But with respect to congressional consideration of the constitutional norms governing preemption in particular, we can perhaps assume that deliberations will occur more frequently—and more frequently before the enactment of legislation—because of the connection between preemption and federalism, and that the effects of judicial overhang will be minimal given the deferential standard of judicial review in preemption cases. In accounting for the motivations of members of

---

<sup>277</sup> My claim is only that Congress has a relatively superior capacity for determining when preemption is constitutionally authorized, not that Congress is superior to other actors in determining which particular state laws will have to be preempted by this or that national statute. Indeed, courts or agencies will almost certainly do better on these latter questions, since they will have crystallized into actual cases by the time they reach a court or agency. Congress in the pre-enactment legislative process, by contrast, can only predict which particular state laws will need to be preempted. *See* Merrill, *supra* note 4, at 753–54.

<sup>278</sup> Young, *Federalism Doctrine*, *supra* note 1, at 1821–22 (arguing that “the factors crucial to comparative institutional analysis—the distribution of stakes, the costs of information, etc.—are likely to vary depending on whether the underlying [constitutional] question involves Congress’s authority to legislate on, for instance, tort reform, abortion, or physician assisted suicide”).

<sup>279</sup> *See id.* (arguing for this retail approach to comparative institutional analysis of governmental engagement with constitutional federalism norms).

Congress and other interested parties, we should also pay attention to the influence of state governments and their lobbying groups.

This suggests that we should also expect variation in the kinds of evidence that will exist to document congressional constitutional decisionmaking. The project of *identifying* congressional constitutional views on a given subject must attend to the nuances of the legislative process. The proof will have to be, as they say, in the pudding. So, we need to know where to look for the pudding. In this section, I survey the kinds of evidence that might demonstrate Congress's constitutional views and discuss some related conceptual issues. I then discuss framework statutes—statutes in which Congress self-consciously alters its own deliberative process on certain issues—as one category of evidence relevant to establishing Congress's views about the constitutional norms governing preemption. I conclude this Part, and the Article, with some thoughts on implications and some comments on avenues for future research.

### *A. Kinds of Evidence*

While the idea of congressional constitutional deliberation and decisionmaking occupies a great deal of scholarly attention, questions about how we might actually identify and understand Congress's constitutional views are relatively unexplored.<sup>280</sup> But the discussion so far tells us quite a bit. For example, if we choose to examine statutes, we know to account for the politics of enactment, including whether interest groups, states, the Executive, or the Judiciary may have distorted the extent to which an enacted statute reflects *Congress's* views. Aside from statutes, we also know that we should regard committee deliberations as an important source of information about Congress's consideration of constitutional issues, that committee culture is an important consideration, and that floor debate and voting likely will be less informative. But there are three broader conceptual points about evidence that we need to consider as well.

First, we may attempt to identify Congress's views about the textual basis and content of the constitutional norms governing preemption without presupposing an answer to the question of whether judicial deference to those views is constitutionally mandatory, on the one hand, or merely instrumentally justified, on the other.<sup>281</sup> The relevant constitutional norms, once identified, may determine the answer to this question, but they may not. I do not propose to answer that question here, but I want to emphasize, once again, that because the courts have not given us a clear account of the textual basis and content of the relevant constitutional norms and, instead, have

---

<sup>280</sup> Cf. Gerhardt, *supra* note 123, at 715 & n.2; Gerhardt, *supra* note 193, at 982.

<sup>281</sup> See *supra* notes 73–91 and accompanying text.

broadly deferred to Congress on the question of preemption's constitutional permissibility, evidence of Congress's understanding of the relevant norms will provide an important piece of the puzzle. It will not necessarily be a decisive piece—we may conclude, all things considered, that Congress has no coherent view, that Congress's view just cannot be right, that its view is underdeveloped, that the courts really should not defer to Congress on constitutional questions about preemption, etc. Identifying and evaluating Congress's views is a way to get a better handle on the question, but it will not necessarily give us the answer.

Second, the nature of Congress as an institution in which groups of individuals act collectively, and the problems discussed in Parts III and IV that plague attempts to identify the actual causes of legislators' and groups of legislators' actions, demonstrate the need to develop criteria for distinguishing those actions that fairly may be characterized as communicating Congress's views. I hinted at this before by suggesting that we may avoid some of the problems associated with trying to identify and understand individual legislators' motivations by focusing on Congress's "institutional outputs."<sup>282</sup> This approach also seems to avoid the problems we would have in trying to identify the causally significant motivations of groups of legislators—say, a committee's reasons for not reporting out a bill, a minority's reasons for a filibuster threat, or a slim majority's reasons for voting a bill through on the House floor over strong minority objections. But identifying Congress's "institutional outputs" is not a simple matter of focusing on the actions of the largest groups of legislators—even unanimous consent in both Houses would not guarantee that the ideas consented to are shared by all the members that voted "yes." Each member may have strategic motivations for voting unrelated to the content of the measure under consideration; and swaths of "yes" votes may be explained by herd or cascade effects "where people imitate others for reputational or informational purposes . . . ."<sup>283</sup> Now, strategic motivations do not disqualify the resulting actions as evidence of congressional constitutional views because it is just in the nature of Congress as an institution to be composed of strategically motivated actors; if we want congressional views, we just have to account for that fact.<sup>284</sup> But we still do not know what it takes for something to qualify as communicating the constitutional views of Congress or any subpart of Congress, or how to factor in strategic motivations and the other considerations outlined above.

---

<sup>282</sup> See *supra* notes 207–217 and accompanying text.

<sup>283</sup> Gersen & Posner, *supra* note 123, at 593 (citing Sushil Bikhchandani et al., *Learning from the Behavior of Others: Conformity, Fads, and Informational Cascades*, 12 J. ECON. PERSP. 151 (1998)). On strategic motivations, see *supra* notes 146–156, 164–166, 199–203 and accompanying text.

<sup>284</sup> See *supra* notes 207–217 and accompanying text.

This problem of identifying Congress's institutional views frames the third conceptual point: Congress's institutional characteristics require us to consider forms of constitutional elaboration and development other than those familiar from judicial decisions. But there may be broad similarities. For example, it is important to reiterate that courts do more than simply interpret the constitutional text. Because constitutional requirements are often vague and difficult to apply to particular cases, courts craft constitutional doctrines—"decision rules"—that are designed to facilitate the judicial task of determining whether, in concrete cases, abstract constitutional norms have been violated.<sup>285</sup> The day-to-day realities of legislating present similar pragmatic problems for simple application of broadly-worded constitutional norms; thus it seems likely that consideration of constitutional requirements and the constitutional permissibility of given legislative actions will often require similar intermediary decisional aids—a practice of developing something like congressional constitutional "decision rules." The collision of abstract constitutional norms with practical situations almost entails that anyone attempting to apply constitutional norms needs decision rules; but in noting this broad structural similarity in decisional process, we must be careful not to presume that Congress's efforts in this regard will resemble judge-made constitutional decision rules. Again, the institutional differences mean that "constitutionally-significant activity in Congress looks and sounds different than it does in courts."<sup>286</sup>

Keith Whittington's descriptive account of legislative constitutional construction provides a useful picture of the way in which Congress generates and acts on its own understandings about the meaning, scope, and application of constitutional norms.<sup>287</sup> "Political practice," Whittington argues

helps define what we understand the Constitution to mean, but it does not arise through anything like interpretive argument and does not exist in the form of constitutional law. The idea of construction helps us understand how constitutional meaning is elaborated even when government officials

---

<sup>285</sup> See Berman, *supra* note 77, at 8–10; *supra* notes 77–83 and accompanying text.

<sup>286</sup> Gerhardt, *supra* note 100, at 537; see also *supra* note 123 and accompanying text.

<sup>287</sup> See generally WHITTINGTON, *supra* note 123. Whittington uses "construction" generally to designate something like Professor Berman's process of creating "constitutional decision rules," regardless of the particular forum, but their accounts differ in significant ways that are beyond the scope of this article. In mentioning the idea of constitutional construction here, I do not mean to endorse or reject any normative theory about how, exactly, courts or Congress should undertake the task of construction. See Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 60–64 (2009) (criticizing Whittington's argument for a form of originalism based on the fact that the Constitution is a written document).

do not seem to be talking about the Constitution, or are not saying anything at all.<sup>288</sup>

Legislative engagement with constitutional issues can range from the extremely deliberative—e.g., constitutional drafting or revolution—to constitutionally banal acts of ordinary policymaking; but even ordinary policymaking may demonstrate Congress's understandings about constitutional meaning "indirectly" by assuming "an underlying consensus on . . . which actions the government may take."<sup>289</sup> Given that nearly any legislative action—even if motivated entirely by strategic considerations—can illuminate some aspect of constitutional meaning, Whittington suggests that "[w]e need a conceptual scheme that can account both for purely political arguments based on either moral theory or pragmatic calculation and for narrowly technical arguments based on precedent or historical intentions."<sup>290</sup> Expanding the focus of our thinking about the mechanisms of constitutional elaboration and development beyond court-like interpretation and doctrine-making allows us to count certain congressional actions as instances of constitutional development, regardless of their motivations. This brings us to the fourth and final conceptual point: the question of what qualifies as evidence for the congressional view is distinct from the question of what kinds of congressional actions qualify as valid, binding law. Many legislative materials that may be highly relevant evidence of Congress's constitutional views nevertheless will not satisfy the criteria for valid, binding laws.

The distinctions between constitutional interpretation from the crafting of constitutional decision rules, and between the process by which courts and Congress derive and apply constitutional decision rules, are particularly important for studying constitutionalism in Congress in areas where Congress has a great deal of discretion to determine the scope of its constitutional authority, as with preemption or, more familiarly, regulation under the Commerce Clause. In these areas, "where the text is so broad or underdetermined as to be incapable of faithful but exhaustive reduction to legal rules," constitutional meaning is best developed not through interpretation but a particular, legislative form of constitutional construction—the partially creative process of combining broad textual permissions with political goals to establish, on a continuing basis, an understanding of the kinds of actions the political branches of government may take.<sup>291</sup> Judicial guidance in these areas is limited to constitutional

---

<sup>288</sup> Berman, *supra* note 287, at 7.

<sup>289</sup> *See id.* at 5.

<sup>290</sup> *Id.* at 7.

<sup>291</sup> *See id.* at 5–6.

boundary-policing—courts say what cannot be done but little about what is permissible. To know what the government considers to be the full range of permissible conduct under the Constitution's power-conferring constitutional norms, like the Commerce Clause, we must look beyond the limited doctrinal guidance in court decisions and focus on congressional practice: legislative constitutional construction.<sup>292</sup> So, too, with preemption. Where Congress has plenary power over a subject—as it may on preemption—the absence of substantive judicial doctrine defining the contours of congressional power leaves us with little else but Congress's constitutional constructions to demonstrate governmental understandings of the textual basis and content of the relevant constitutional power-conferring norms.<sup>293</sup>

Shifting focus from constitutional interpretation to construction in Congress requires looking at a wide variety of legislative materials, not just those that contain court-like interpretive statements about the meaning of constitutional provisions. We are familiar with judicial statements of constitutional meaning and judge-made constitutional doctrines (decision rules), and we know how to find, parse, and evaluate them; but when we start looking for legislative constitutional constructions, the question naturally arises: How do we know what counts? One common feature of legislative constitutional constructions, in Whittington's view, is that they "resolve textual indeterminacies" and "address constitutional subject matter," and actions can qualify as constructions "even if explicit references to the terms of a specific written constitution are rare or nonexistent."<sup>294</sup> This does not rule out very much. We are, in fact, swimming in an ocean of potential evidence about congressional constitutional views. There seem to be two broad categories of evidence about congressional constitutional views, which I will call "statement" and "pattern" evidence. Statement evidence includes actions amounting to direct congressional statements about constitutional meaning—for example, a resolution declaring that "[p]ursuant to Article I, Section 8 of the Constitution of the United States, Congress has the sole and exclusive power to declare war."<sup>295</sup> I also mean statement evidence to

---

<sup>292</sup> See Gerhardt, *supra* note 123, at 745–54 (arguing that courts do a relatively small portion of constitutional work and that most constitutional development occurs in non-judicial forums); Young, *supra* note 123, at 413 (stressing "the extent to which the Constitution permits basic constitutive questions to be answered by subconstitutional norms . . ." and that the canonical Constitution's "relevance typically takes the form of a set of outside limits . . ."); *id.* at 444–46 (arguing that nonjudicial actions serve important functions in, among other things, implementing, specifying, and supplementing broad constitutional provisions).

<sup>293</sup> On the possibility of plenary preemptive power, see *supra* notes 73–90 and accompanying text.

<sup>294</sup> WHITTINGTON, *supra* note 123, at 9.

<sup>295</sup> Gersen & Posner, *supra* note 123, at 616 n.189 (quoting H.R. Conf. Res. 102, 108th Cong. (2003)).



include policy actions that, either explicitly or implicitly, are designed to resolve a particular constitutional issue—for example, a committee’s rejection of a policy proposal on the ground that it is unconstitutional.<sup>296</sup> Pattern evidence is the broader category, and includes all actions that, alone or in the aggregate, demonstrate Congress’s assumptions about some aspect of constitutional meaning—most often about the scope of Congress’s constitutional powers.<sup>297</sup>

Whittington admits that it will often be difficult to determine which congressional actions are constitutional constructions and which are “mere rhetoric;” an action’s endurance over time, he says, may be the only signal that it was, in fact, an elaboration of Congress’s views about constitutional permissibility.<sup>298</sup> Surely we need a criterion of significance, too—after all, many instances of “mere rhetoric” or relatively insignificant legislative constitutional construction—e.g., ordinary acts of policymaking that really only demonstrate Congress’s assumption that the particular policy was constitutionally authorized—will have stood unrepudiated for a long time. We need a way to focus in on the important evidence that does not require a deep—and probably fruitless—search for legislators’ actual motivations.

One promising approach is to adopt a legislator’s perspective.<sup>299</sup> Thus, we might ask what actions are properly regarded as congressional constitutional precedents.<sup>300</sup> Gerhardt defines non-judicial precedent as “any past constitutional judgments of non-judicial actors that courts or other public authorities imbue with normative authority.”<sup>301</sup> Congressional constitutional precedents, on this view, will be congressional actions that actors within or outside Congress make recognizable efforts to invest with “normative force” as to constitutional issues—that is, to make them binding or at least authoritative in future consideration of the same or similar constitutional issues. For example, the Senate’s multiple votes in 1789 against the impeachability of Senator William Blount are regarded as precedent for the proposition that it is constitutionally impermissible to

---

<sup>296</sup> See Gerhardt, *supra* note 123, at 738 (noting, as an example of congressional constitutional decisionmaking, “the Senate’s rejection of President Roosevelt’s Court-packing plan” after the “Senate Judiciary Committee declared the plan ‘unconstitutional’”).

<sup>297</sup> See WHITTINGTON, *supra* note 123, at 3–5; Gerhardt, *supra* note 123, at 738.

<sup>298</sup> See WHITTINGTON, *supra* note 123, at 14–15; *cf.* Gerhardt, *supra* note 123, at 762–63 (suggesting that the precedential value of legislative actions depends in part on how long they have been around and “how they have been cited or used in the past”).

<sup>299</sup> *Cf.* Gerhardt, *supra* note 100, at 537 (arguing that, in evaluating congressional constitutional decisionmaking, “one thing to consider is what *Congress* treats as constitutional law” (emphasis added)).

<sup>300</sup> See generally Gerhardt, *supra* note 123; Gerhardt, *supra* note 193, at 982–88.

<sup>301</sup> Gerhardt, *supra* note 123, at 715.

impeach members of Congress; both the Senate votes, themselves, and their subsequent treatment by members of Congress and commentators are the relevant efforts to add "normative force" that identify the action as constitutional precedent.<sup>302</sup> Congressional constitutional precedents may contain either statement or pattern evidence, but they are a subset of all the evidence of Congress's constitutional views. All acts of policymaking are at least pattern evidence illustrating Congress's assumptions about the scope of its constitutional authority; but people will not make the effort to imbue all acts of policymaking with normative force as to these predicate constitutional assumptions.<sup>303</sup> The category of congressional constitutional precedents is also over- and under-inclusive of the category of Congress's constitutional constructions: Something that has been regarded as a congressional constitutional precedent for a long enough time likely will, on Whittington's view, be fairly considered an instance of legislative constitutional construction; but not everything now regarded as congressional constitutional precedent will be around long enough to qualify as a legislative constitutional construction.

Other questions remain. First, how can we determine the evidentiary value of relatively recent actions that, by their substance, suggest Congress was attempting to resolve a constitutional issue? And, perhaps more importantly, how can we assess the relative value of evidence once it is identified? To answer these questions, we need to look at the effects of actions that we think may disclose relevant evidence. Whittington suggests this in noting that "to the degree that they are successful [legislative constitutional constructions] constrain future political debate."<sup>304</sup> In this sense, Whittington's and Gerhardt's accounts seem to focus on the same phenomena. Precedents, by definition, influence the nature of future congressional debates; even if they are relatively weak, legislators must at least account for them. The purpose of efforts to imbue things with normative force, converting them into precedents, is to affect Congress's future consideration of similar issues. When the substance of the potential precedent is a constitutional issue, the effort to establish it as precedent seems like the same thing as self-conscious legislative constitutional construction.<sup>305</sup>

Whittington's focus on the durability of legislative constitutional constructions and Gerhardt's focus on efforts in Congress to imbue actions

---

<sup>302</sup> See *id.* at 724–25.

<sup>303</sup> See *id.* at 737–38 (noting that non-judicial precedents may have "purely constitutional content," may consist of "mixtures of constitutional and policy judgments," or "may consist primarily of policy" actions that demonstrate "implicit judgments . . . about the constitutionality" of the policy).

<sup>304</sup> WHITTINGTON, *supra* note 123, at 6.

<sup>305</sup> See Gerhardt, *supra* note 193, at 995 (noting the relationship between his conception of non-judicial precedent and Whittington's view).

with normative force are both consistent with the recognition that “a statement is credible when it is accompanied by a costly action—in particular, an action that is more costly for a dishonest speaker to engage in.”<sup>306</sup> Generating durable legislative constitutional constructions and converting actions into precedents are both costly, not least of all because they prospectively limit Congress’s freedom of choice to one degree or another. The costs of such actions indicate that they are likely to accompany *credible* statements, not “mere rhetoric.” This allows us to identify relatively new actions that likely will come to fit the criteria for legislative constitutional constructions over time: Statements that are accompanied by costly actions on the front end seem more likely to stand the test of time. Recall, too, that our concern about “strategic talk” was that we would be unable to tell whether statements about constitutional issues are sincere or, instead, merely uttered for their instrumental value in promoting some goal unrelated to constitutional deliberation—in other words, we had a credibility concern.<sup>307</sup> Costly actions are a proxy for the credibility of the statements they accompany (or the patterns they establish); thus assessing the costs of actions seems to be an approach that accounts for some of our concerns and potentially points us toward the more legitimate evidence of Congress’s constitutional views.

Limiting our focus to congressional constitutional precedents guarantees a baseline degree of credibility—imbuing something with normative force to convert it into a precedent always will impose at least the costs of lost opportunities associated with precedent’s constraining effect on future action. This approach seems to rule out enough material to make the universe of permissible evidence manageable while ruling in enough evidence to support potentially illuminating investigation. But it does rule in quite a bit, so we still need a method for assessing the relative value of different pieces of evidence. And assessing the costs of actions accompanying or constituting our evidence is a useful proxy for evidentiary *value* as well as basic evidentiary *status*. Generally speaking, the more costly the action accompanying or comprising the evidence is, the better the evidence.<sup>308</sup> I think that there are three important dimensions on which the costs of those

---

<sup>306</sup> Gersen & Posner, *supra* note 123, at 589 (labeling this a “standard insight of the signaling theory literature in economics”).

<sup>307</sup> See *supra* notes 199–206 and accompanying text.

<sup>308</sup> See Gersen & Posner, *supra* note 123, at 594–97 (discussing the relative costs of statutes and resolutions and the implications of those costs for credibility). This is not to say that “cheap talk” can never be credible—it certainly can be under certain conditions. See *id.* at 589–90. The only point here is that in general, if we have several pieces of evidence to choose from, the one accompanied by the costlier action is likely to be the better one. Nuances surrounding particular categories or pieces of evidence may, of course, indicate a different conclusion.

actions may vary. First, there will be variation in the cost of taking different kinds of actions in Congress. Statutes are probably the most costly action—enactment is costly because it requires the full legislative process, both houses of Congress, and the President, and statutes are costly because they are difficult to repeal.<sup>309</sup> But other actions—e.g., mustering a supermajority to end a filibuster in the Senate, mustering a floor majority to pass a resolution, mustering committee or subcommittee majorities to report bills out or issue reports—all impose varying costs in terms of time, resources, lost opportunities, and political capital.<sup>310</sup> Costs also vary according to the public visibility of the action: the “civilizing force of hypocrisy” idea that taking inconsistent actions undercuts members’ credibility, and thus effectiveness, suggests that the cost of taking an action increases with the public visibility of the policy or constitutional positions members have to take—and thus adhere to later or risk their credibility—in supporting the action.<sup>311</sup>

Second, it may be more or less costly to convert an action into a constitutional precedent depending on the kind of action. The cost of conversion to precedent seems to depend most heavily on the salience of the particular constitutional decision that one attempts to imbue with normative force. Thus, converting a statute into a constitutional precedent may be relatively cheap if the statutory text speaks directly to the constitutional issue or if the statute is otherwise obviously representative of the constitutional decision—e.g., a statute banning abortions. The fact that the constitutional decision is embodied in the statute in such a direct kind of way imparts to the constitutional decision the normative force of the statute itself, and little else may be needed to create a precedent. But converting, say, an ordinary administrative statute with little obvious constitutional dimension into a sweeping precedent about the constitutional separation of powers might be much more costly, not least of all because it would require a great deal of extra-statutory communication about the statute’s constitutional significance by those interested in creating the precedent.

A third dimension along which cost may vary—and one that is particularly important in relation framework statutes—is the extent to which an action constrains future congressional conduct.<sup>312</sup> Greater constraint logically will cost more in terms of lost future opportunities; the costs of

---

<sup>309</sup> See Garrett, *Purposes*, *supra* note 13, at 750–53; Gersen & Posner, *supra* note 123, at 594. On the difficulty of amending or repealing statutes, see sources cited *supra* note 269.

<sup>310</sup> See Gersen & Posner, *supra* note 123, at 597.

<sup>311</sup> See *supra* notes 167–172 and accompanying text; see also Gersen & Posner, *supra* note 123, at 589.

<sup>312</sup> See generally Garrett, *Purposes*, *supra* note 13, at 749–51 (discussing the political and lost opportunity costs of actions that constrain legislators’ future options).

enacting constraints initially will also increase with the extent to which legislators recognize their potential to lose future opportunities to promote their own interests, and especially if they are uncertain about how the constraint will affect their interests in the future.<sup>313</sup> The cost of creating a precedent will also increase with the extent to which it is intended to be authoritative in institutions outside of Congress; this aspect of cost may be high even if a precedent does not impose a very costly constraint within Congress itself—as with Senate Judiciary Committee approval of judicial nominees, which other branches are absolutely bound to accept, but which Senators themselves may freely ignore in voting on a nomination.<sup>314</sup> Generally, then, the cost of creating a congressional constitutional precedent will vary according to the degree of normative force with which it is invested.<sup>315</sup> All these costs decrease, of course, if the constraint will be easy to evade.<sup>316</sup> A good proxy for these costs is the formality of the precedent: traditions and practices cost the least because they cost little to create, rarely apply outside Congress, and are most easily ignored or changed; formal procedural rules in Congress are somewhere in the middle because they are slightly more difficult enact and to change; and statutes constraining future legislator conduct by altering the legislative process are most costly because they may be quite costly to enact, may have effects outside Congress, and may be quite difficult to change or circumvent.<sup>317</sup>

The credibility of a precedent, and thus its evidentiary value, will vary depending on the total cost associated with taking the action and imbuing it with the desired degree of normative force. Evaluating costs in this manner is

---

<sup>313</sup> See, e.g., *id.* at 749–52 (discussing the way that framework statutes “take certain options off the legislative table” and “commit lawmakers to the pursuit of objectives that promise a stream of benefits over the long term but that will require sacrifice of some interests that provide immediate, albeit less valuable, benefits,” and that “[l]egislators are loathe to accept such constraints—which, if successful, may disserve their short-term interests relevant to re-election”); *id.* at 736–38 (noting that sometimes in enacting framework statutes legislators must operate behind a “veil of ignorance” as to the future decisions the framework will impact, which pressures them to adopt more neutral rules).

<sup>314</sup> See Gerhardt, *supra* note 123, at 754–57 (discussing how non-judicial precedents may vary in their binding effect across governmental institutions); *id.* at 756–57 (discussing Senate Judiciary Committee nomination recommendations).

<sup>315</sup> See generally *id.* at 754–58.

<sup>316</sup> Cf. Garrett, *Federalism*, *supra* note 13, at 1508 (noting that the congressional precommitment represented by a framework statute is “as credible as the enforcement mechanisms [the statute] contains”).

<sup>317</sup> See Gerhardt, *supra* note 123, at 756 (noting that non-judicial constitutional precedents in the form of “traditions, customs, or historical practices” are relatively weak, operating only “as persuasive authority within the institutions creating them and in other institutions”); *id.* at 757 (arguing that formal procedural rules in Congress are relatively difficult to change); Garrett, *Purposes*, *supra* note 13, at 749–52 (discussing the costs of entrenching legislative process changes in statutes).

one way to account for some of the nuances of the legislative process and the concerns that they raise, but it is only a proxy. The quality of particular evidence will vary on other dimensions regardless of cost. But the evaluation of the costs of statements and actions, and the consideration of other nuances, is best done in the process of examining the evidence. One category of evidence that I think provides a good starting point for present purposes is framework statutes—statutes by which Congress alters the legislative process to enhance its own capacity to deliberate about legislation—so I will undertake the analysis here for framework statutes and in future work for other categories of evidence.

### *B. Statutory Evidence: Frameworks*

Statutes clearly may constitute either statement or pattern evidence of congressional constitutional views. They are, after all, the most straightforward examples of Congress's "institutional outputs." Statutes certainly may qualify as congressional constitutional precedents—the only requirement is investment with normative force and enacting statutes is the most direct way for Congress to do that. And since statutes are the most costly actions Congress can take; our proxy for credibility indicates that statements embodied in or accompanied by statutes likely will be of high evidentiary value.<sup>318</sup> But, since they have to run the full gauntlet of the federal legislative process, examining statutes as evidence requires accounting for the full panoply of distorting factors: strategically motivated rhetoric and actions, interest group influence, judicial overhang, and so on. Statutes have another potential evidentiary downside, as well. Gersen and Posner argue that statutes may be inexact representations of congressional views—that is, they may be "impure" evidence—because the constitutional presentment requirement gives the President an opportunity to influence statutory content.<sup>319</sup> Thus, they suggest that congressional resolutions, which do not require presentment to the President but are still relatively costly to pass, may be the best evidence of pure congressional preferences.<sup>320</sup>

It is not clear that this impurity problem matters very much for present purposes. While there are several contexts in which we might need access to pure congressional views, undistorted by presidential influence—for example, to establish Congress's understanding of the scope of its own part of constitutional powers it shares with the Executive, like the war powers—it is not clear that preemption is such a context.<sup>321</sup> Despite courts' rhetorical focus

---

<sup>318</sup> See Gersen & Posner, *supra* note 123, at 594, 597.

<sup>319</sup> See *id.* at 594–96.

<sup>320</sup> See *id.* at 595–96.

<sup>321</sup> See *id.* at 596.

on “congressional intent,” judicial deference in preemption cases is deference to the *results* of the national legislative process—which, by constitutional mandate, includes presentment to the President.<sup>322</sup> My suggestion in Part III that we take an “institutional view” of Congress rather than focus on the motivations of individual legislators does not as a conceptual requirement exclude presidential influence, since that influence is just endemic to the constitutionally mandatory legislative process. As I have argued at length elsewhere, the Executive’s constitutional authority to preempt state law and influence the preemptive scope of federal statutes is unsettled.<sup>323</sup> Introducing the possibility of presidential influence by focusing on enacted statutes just adds another actor and thus another set of motivations, institutional constraints, and so on that we will need to account for in fleshing out the non-judicial views to which the courts are deferring in preemption cases.

Individual preemptive statutes will yield a wealth of both statement and pattern evidence about Congress’s views on the constitutional requirements for preemption—in themselves and in the materials documenting Congress’s consideration of them before and after enactment. Because of the number and variety of preemptive statutes, consideration of these materials is a large task and will involve a number of specific evidentiary questions. I will take up the examination of specific preemptive statutes in at least two follow-on papers.<sup>324</sup> Here, I want to focus on a category of statutory evidence that I think is particularly relevant and interesting for our purposes: framework statutes.

Congress is “an institution that both engages in substantive deliberation in specific contexts and also has some collective capacity for self-assessment, that struggles over time to adjust its own procedures for constitutional deliberation, and that is willing to consider, in its collective capacity, proposals for deliberative improvement.”<sup>325</sup> Framework legislation, which “creates rules that structure congressional lawmaking” and “establish internal procedures that will shape legislative deliberation and voting with respect to certain laws or decisions in the future,” is one mechanism by which Congress

---

<sup>322</sup> Courts do sometimes consult legislative history in construing the preemptive scope of statutes, and in that effort do seem to be looking for “pure” congressional views. But it is unlikely that a court would not consider such views to be determinative of preemptive scope if doing so required them to disregard evidence that the final language of an express preemption provision was the result of a careful compromise between the congressional majority and the President.

<sup>323</sup> See generally Pursley, *Deference*, *supra* note 5, at 557.

<sup>324</sup> Preliminarily, I think a way to make the task more manageable is to divide the universe of evidence by regulatory subject. Tentatively, one study would focus on preemptive statutes relating to health and safety issues, including medicine; while another would focus on preemptive statutes relating to financial matters, including banking, securities, labor and employment, and insurance.

<sup>325</sup> Garrett & Vermeule, *supra* note 91, at 1303.

may accomplish such deliberative improvement.<sup>326</sup> There are numerous examples of framework legislation that structure Congress's consideration of a wide spectrum of issues, from budgetary matters to military base closures.<sup>327</sup> Elizabeth Garrett has exhaustively catalogued and analyzed framework statutes elsewhere.<sup>328</sup> Here, I want to focus on framework statutes that relate to Congress's consideration of preemptive legislation.

The distinct purposes of framework statutes enhance their evidentiary value.<sup>329</sup> Framework statutes often serve as symbolic congressional responses to salient constitutional issues, and to fulfill this function they may contain direct or relatively clear statements of congressional constitutional views.<sup>330</sup> Thus, aside from explicit responses to judicial constitutional decisions, the enactment of framework laws seems like the closest thing to judicial constitutional "interpretations" that we are likely to get from Congress. For the same reason, framework statutes are likely to be viewed as congressional constitutional precedents: they are designed to statutize Congress's constitutional determinations; thus their normative force as enacted statutes invests the constitutional determinations they communicate.<sup>331</sup> Framework statutes are also intended to function as substantive precommitment devices, imposing relatively durable constraints on legislators' future choices; this makes them very costly to enact.<sup>332</sup> Their precommitment function also offsets some of the potential problems of strategically motivated behavior: Rather than solving a particular policy problem, framework statutes impose rules that constrain the way that members of Congress will be able to address a certain set of policy issues in the future. Most often, at the time framework legislation is considered and enacted, legislators will not have full knowledge of whether the rules will be beneficial or detrimental to their interests in future situations.<sup>333</sup> Thus they will be operating behind a kind of "veil of ignorance," and the most pressing

---

<sup>326</sup> Garrett, *Purposes*, *supra* note 13, at 718.

<sup>327</sup> See *id.* at 723–32 (eleven examples); Fisher, *Interpretation*, *supra* note 124, at 728–29 (discussing the statutory establishment of the Office of Senate Legal Counsel and statutory establishment of committee oversight requirement to monitor judicial decisions of interest to Congress); Fisher, *supra* note 128, at 68 (discussing statutory expansion of the Congressional Research Service).

<sup>328</sup> See generally Garrett, *Enhancing*, *supra* note 13; Garrett, *Federalism*, *supra* note 13; Garrett, *Purposes*, *supra* note 13.

<sup>329</sup> On purposes generally, see Garrett, *Purposes*, *supra* note 13, at 733–64.

<sup>330</sup> See Garrett, *Purposes*, *supra* note 13, at 733–34.

<sup>331</sup> See *supra* notes 311–312 and accompanying text.

<sup>332</sup> See Garrett, *Purposes*, *supra* note 13, at 748–53; *supra* notes 311–317 and accompanying text.

<sup>333</sup> See Garrett, *Purposes*, *supra* note 13, at 736–37.



incentive will be to enact the most fair and neutral rules possible regardless of more specific strategic interests.<sup>334</sup>

The congressional constitutional determinations communicated by framework statutes also seem less likely to be distorted by judicial overhang. On the surface, this might appear to be so because judicial review of the internal workings of Congress—which framework statutes alter or affect—is practically non-existent.<sup>335</sup> But several more “creative” provisions of framework statutes, in fact, have been subjected to judicial review and invalidated.<sup>336</sup> Provisions that attempt to affect procedures in governmental institutions beyond Congress—most often the Executive—tend to draw negative judicial attention rather than provisions that structure internal congressional processes.<sup>337</sup> Thus courts invalidated the Line Item Veto Act and a provision of the Gramm-Rudman-Hollings Act, establishing a role for the Comptroller of the GAO in the congressional budget framework statute on constitutional grounds.<sup>338</sup> The legislative veto, of course, was also invalidated on constitutional grounds and did relate primarily to internal congressional processes, but Congress has been particularly resistant to deferring to that judicial constitutional conclusion.<sup>339</sup> Despite judicial review of some framework laws, then, Congress primarily controls—and believes that it should control—the structuring of its internal processes.<sup>340</sup>

Finally, the congressional-process focus of framework legislation in general seems to reduce the risk of the “impurity” problem that arises from

---

<sup>334</sup> See *id.* (arguing that in considering framework legislation, “the choice of rules and procedures will be driven by factors other than—or at least in addition to—how political actors expect the rules to further the particular interests of their constituents and other electoral supporters,” and that “[b]y taking advantage of the ability to specify rules and procedures before the issues that will trigger application of the framework can be fully anticipated, lawmakers are able to devise rules that will appear, and often are, fairer and that can therefore enhance the legitimacy of decisions”); see also *id.* at 737–38 (giving theoretical reasons to think that fairer, more neutral rules are likely to be enacted under these conditions).

<sup>335</sup> See Gerhardt, *supra* note 123, at 748–51; Gerhardt, *supra* note 193, at 982–86.

<sup>336</sup> Garrett, *Purposes*, *supra* note 13, at 730.

<sup>337</sup> See *id.* at 730–31.

<sup>338</sup> See *Clinton v. New York*, 524 U.S. 417, 421 (1998) (striking down the line item veto); *Boswher v. Synar*, 478 U.S. 714, 720–21 (1986) (invalidating provisions of Gramm-Rudman-Hollings); Garrett, *Purposes*, *supra* note 13, at 730–31 (discussing these decisions).

<sup>339</sup> See Garrett, *Purposes*, *supra* note 13, at 730 (discussing *Chadha*); *supra* note 145 and accompanying text.

<sup>340</sup> See Garrett, *Purposes*, *supra* note 13, at 731 (noting that “procedure is not wholly determined by Congress; rather, there are some constitutional limits to innovation that are enforced by the courts”).

looking at enacted statutes as evidence, at least to an extent.<sup>341</sup> It seems reasonable to think that a President will be less motivated to exert influence to alter the content of legislation that is primarily concerned with Congress's internal decisionmaking processes. Of course, some framework statutes have provisions that purport to affect the Executive Branch—like the legislative and line-item vetos—and Presidents will have strong incentives to attempt to influence those kinds of provisions. But the framework statutes we will examine here primarily deal with congressional process, so the general observation is still pertinent. Particular framework statutes nevertheless may present particular problems of Presidential influence: where a framework statute is designed to address a politically salient issue, a President may incur political costs by declining to take a position one way or the other in the legislative process. If the proponents of the legislation are political allies, it may be in the President's interest to try to strengthen the statute; if they are political opponents, it might be in the President's interest to weaken it. We will need to account for these effects in looking at particular statutes.

Framework statutes may be significant for our purposes in at least three ways. First, when they apply to preemption, they may make it more likely that Congress will engage in deliberation about the relevant constitutional norms and that such deliberation will be well-informed. Second, insofar as they set out specific forums and procedures for heightened deliberation, they may point us to good sources of evidence of congressional constitutional views.<sup>342</sup> Third, and most interesting here, where the constitutional norms we are interested in relate to the process of legislative decisionmaking, Congress's statutory enhancements to its deliberative process may themselves provide important evidence about the relevant congressional constitutional views. And the constitutional norms relating to preemption may well have to do with congressional process; recall that federalism is one of the constitutional norms relevant to preemption and that one prominent view of federalism norms is that they are implemented in large part by the structure of the national legislative process.<sup>343</sup> It is this third possibility that I want to consider here.

The most important piece of framework legislation relating to preemption—and the only one currently in effect—is the Unfunded Mandates Reform Act (UMRA). Enacted in March 1995, UMRA creates a prospective procedural framework for Congress's consideration of legislation

---

<sup>341</sup> See Gersen & Posner, *supra* note 123, at 595–96; *supra* notes 319–320 and accompanying text.

<sup>342</sup> UMRA does, in some instances of preemption, exactly what Garrett & Vermeule's proposed "office of constitutional issues" and "constitutional impact statement" requirements would do for all constitutional issues—their proposal is modeled on the UMRA. See Garrett & Vermeule, *supra* note 91, at 1307–08.

<sup>343</sup> See *supra* Part IV.A.

containing unfunded intergovernmental mandates.<sup>344</sup> The statute defines “federal intergovernmental mandate” as any legislation, statute, or regulation that “would impose an enforceable duty” on a state or local government; that would reduce or eliminate appropriations for existing intergovernmental mandates; or that would heighten conditions or reduce funding for certain federal entitlement programs benefitting or administered by state or local governments.<sup>345</sup> UMRA is not intended to bar Congress from enacting unfunded mandates; rather, its express purposes are “to end the imposition [of unfunded mandates] in the absence of full consideration by Congress,” to “promote informed and deliberate decisions by Congress on the appropriateness of Federal mandates in any particular instance,” and to “assist Congress in its consideration” of legislative proposals containing unfunded mandates.<sup>346</sup> Toward these ends, UMRA “add[s] more obstacles to the enactment of unfunded mandates than usually face legislative proposals.”<sup>347</sup>

The first function of UMRA is to ensure that Congress is alerted to, and receives sufficient substantive information to deliberate seriously about, the effects of unfunded mandates in pending legislative proposals. Congress is typically alerted to constitutional issues on a “fire alarm” model—while members occasionally identify and bring constitutional concerns to Congress’s attention on their own, Congress’s time and resource constraints, and the general lack of legislator incentive to comb bills for constitutional problems, dictate that most of this kind of monitoring and alerting must be done by third parties.<sup>348</sup> UMRA creates systematic monitoring for unfunded mandate issues—and thus, importantly ensures that Congress is alerted to those issues at a time in the legislative process when the information can make a difference in the outcome—by requiring, with some exceptions, that the committee reporting any bill, or joint resolution containing an intergovernmental mandate, provide the legislation to the Congressional

---

<sup>344</sup> Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48 (codified in various sections of Title 2 of the U.S.C.). For detailed descriptions of UMRA’s enactment, content, and effects, see generally Robert W. Adler, *Unfunded Mandates and Fiscal Federalism: A Critique*, 50 VAND. L. REV. 1137 (1997); Garrett, *Enhancing*, *supra* note 13; Garrett, *Federalism*, *supra* note 13. UMRA has two titles: Title I relates to the federal legislative process; Title II requires federal administrative agencies to assess intergovernmental mandates in enacted statutes. For our purposes, Title I is most important.

<sup>345</sup> 2 U.S.C. § 658(5) (2006).

<sup>346</sup> 2 U.S.C. § 1501 (2006).

<sup>347</sup> Garrett, *Federalism*, *supra* note 13, at 1504.

<sup>348</sup> See Garrett & Vermeule, *supra* note 91, at 1300–01 (discussing this “fire alarm” system); see also PICKERILL, *supra* note 120, at 65 (legislators not focused on constitutional issues); *supra* notes 163–165 and accompanying text (same).

Budget Office (CBO) for analysis of the mandate.<sup>349</sup> Based on its analysis, CBO prepares a UMRA statement that is included in the committee report sent to the floor.<sup>350</sup> If the CBO determines that the mandates in a legislative proposal will impose \$50 million or more in direct costs in any of the five fiscal years after the mandates' effective date, it must include in its mandate statement an estimate of the total direct costs of the mandates and note any budgetary or appropriations authority for funding the mandates.<sup>351</sup> UMRA's reporting requirements thus increase the substantive information about unfunded mandates in legislative proposals that is available to authorizing committees and, by inclusion of the UMRA statement in the committee report, to all members of Congress before they vote on such proposals.<sup>352</sup>

---

<sup>349</sup> See 2 U.S.C. § 658b(b) (2006); see also Garrett, *Federalism*, *supra* note 13, at 1510–11 (noting the importance of raising “fire alarms” in Congress in a timely fashion and how UMRA facilitates this for mandates issues). One major exclusion is that UMRA's requirements do not apply to most federal legislation that imposes duties on sub-national governments as a condition of receiving federal funds or participating in voluntary federal programs. See 2 U.S.C. § 658(7)(A) (2006); Garrett, *Federalism*, *supra* note 13, at 1499 (arguing that this “allows bills with substantial implications for federalism to escape UMRA review”). UMRA does not apply to appropriations bills, although CBO informally reviews these and often alerts Congress to mandate issues. See 2 U.S.C. § 658d(c)(1) (2006); Garrett, *Federalism*, *supra* note 13, at 1500 (citing CONG. BUDGET OFFICE, A REVIEW OF CBO'S ACTIVITIES UNDER THE UNFUNDED MANDATES REFORM ACT, 1996 TO 2005, 59 n.2 (2006), available at <http://www.cbo.gov/ftpdocs/71xx/doc7111/03-31-umra.pdf>). UMRA also has other specific exclusions, see 2 U.S.C. § 658a (2006), but the CBO estimates that only about 2% of bills fit into these exclusions. See Garrett, *Federalism*, *supra* note 13, at 1499–500 (citing U.S. Gov't Accountability Office, UNFUNDED MANDATES: VIEWS VARY ABOUT REFORM ACT'S STRENGTHS, WEAKNESS, AND OPTIONS FOR IMPROVEMENT 10 (2005), available at <http://www.gao.gov/new.items/d05454.pdf>).

<sup>350</sup> See 2 U.S.C. §§ 658b(a)–(d), (f), 658c(a)–(b) (2006). For mandates above a certain monetary threshold, CBO is required to provide a direct cost estimate, 2 U.S.C. § 658(3)(A)(i) (2006); CBO must include in its statement information on any federal funding for the mandate that has been provided, 2 U.S.C. § 658c(a)(2)(C), (b)(2)(B) (2006), and must, if requested and “to the greatest extent practicable,” provide mandate statements for mandates added by floor amendments or conference committee actions, 2 U.S.C. § 685c(d). See Garrett, *Federalism*, *supra* note 13, at 1500–01 (describing these UMRA requirements and noting that “[f]rom 1996 to 2005, the CBO formally reviewed approximately 5800 bills and other legislative proposals” pursuant to UMRA).

<sup>351</sup> See 2 U.S.C. § 658c(a) (2006).

<sup>352</sup> Commentators agree that committees are the most important forums for deliberation and substantive decisionmaking in Congress, including on constitutional issues. See, e.g., Davidson, *supra* note 127, at 100; Sinclair, *supra* note 103, at 298–302; Whittington, *supra* note 104, at 87–88. But at least sometimes, deliberation on the floor is important too; thus, providing adequate information for legislators in floor votes is an important goal. See Davidson, *supra* note 127, at 113 (giving examples of apparently meaningful floor deliberations on constitutional issues); Fisher, *Interpretation*, *supra* note 124, at 719–22 (more examples); Garrett & Vermeule, *supra* note 91, at 1304. But see

Sufficient substantive information is a necessary prerequisite to informed deliberation about an issue—and one that is lacking in Congress’s consideration of many constitutional issues—therefore UMRA, at least in principle, increases the likelihood of potential for serious congressional deliberation about the impact of unfunded intergovernmental mandates on state and local governments.<sup>353</sup> And, since CBO is a bipartisan agency not affiliated with interest groups that might have stakes in the fate of the legislative proposals CBO analyzes; the information that CBO provides to Congress should be relatively impartial.<sup>354</sup>

The other important way that UMRA alters the legislative process for intergovernmental mandates is through its enforcement mechanisms.<sup>355</sup> Legislators may raise a point of order if a bill containing a mandate is not accompanied by a mandate statement—call this a “procedural” point of order; they may also raise a “substantive” point of order against bills containing unfunded mandates that exceed the \$50 million direct cost threshold.<sup>356</sup> These points of order can be waived by majority vote in either

---

Frickey & Smith, *supra* note 130, at 1744 (broadly critiquing the idea that Congress’s chamber floors will often be a site for “deliberation” in the idealized sense).

<sup>353</sup> See Garrett, *Federalism*, *supra* note 13, at 1500–01 (describing the kinds of information UMRA requires to be provided to Congress); see also Fisher, *Interpretation*, *supra* note 124, at 727–31 (discussing Congress’s information resources); Frickey & Smith, *supra* note 130, at 1740 (“A wide variety of resources, unmatched by any other legislature in the world, are at the disposal of members and their committees.”); Garrett & Vermeule, *supra* note 91, at 1304–05 (suggesting ways to improve Congress’s capacity to gather substantive information about constitutional issues); Gerhardt, *supra* note 100, at 528–29 (arguing that Congress has substantial resources for gathering information once it is alerted to an issue).

<sup>354</sup> One problem with the information available to alert Congress to, and inform Congress about, constitutional issues is that interest groups are one major source and, to the extent that they are interested in the outcome, they have incentives to provide biased information. See Garrett & Vermeule, *supra* note 91, at 1313; Garrett, *Federalism*, *supra* note 13, at 1510. On CBO’s relative neutrality, see Garrett, *Federalism*, *supra* note 13, at 1510 (noting that “[u]nder the UMRA framework, interested groups still interact with the CBO as it produces mandate cost statements and provides necessary data, but that information is weighed and analyzed by the CBO’s professional, nonpartisan staff before it is disseminated to Congress”); see also Fisher, *supra* note 128, at 73–74 (discussing CBO).

<sup>355</sup> See Garrett, *Federalism*, *supra* note 13, at 1501–02 (discussing UMRA’s enforcement provisions).

<sup>356</sup> 2 U.S.C. § 658d(a)(1)–(2) (2006). On points of order generally, see Garrett, *Enhancing*, *supra* note 13, at 1160–61. The procedural “point of order does not lie against conference committee reports or amended bills for which CBO is stongly urged,” but not required, to provide a mandate statement. See 2 U.S.C. § 658d(a)(1) (2006); Garrett, *Enhancing*, *supra* note 13, at 1162. Even if accompanied by a mandate statement, a mandate above the \$50 million threshold is out of order unless it is funded either through new direct spending or by reference to a separate appropriations bill, if Congress

chamber, but nevertheless function to focus Congress's attention on mandates and, potentially, to alter legislative outcomes.<sup>357</sup> UMRA's point of order provisions empower members of Congress to force separate votes on unfunded mandates, and thus increase the potential for meaningful congressional deliberation about them, even in situations where modern developments in the legislative process might otherwise block such votes. For example, the House Rules Committee more and more frequently issues special rules governing floor consideration of major legislation that restrict members' ability to raise objections—including constitutional objections—on the House floor.<sup>358</sup> Additionally, the increased use of legislative "bundling"—the practice of combining numerous legislative proposals into omnibus bills—often robs members of the information they need to make informed decisions in floor voting.<sup>359</sup> Aside from the decreased visibility of individual legislative proposals when they are bundled together into omnibus bills, debate on omnibus legislation is often limited by special rule, further inhibiting members' ability to call attention to problematic portions.<sup>360</sup> UMRA disempowers the Rules Committee by providing that special rules attempting to prohibit UMRA-based objections are themselves subject to a point of order.<sup>361</sup> UMRA points of order, in turn, allow members to disaggregate omnibus legislation and thereby increase the visibility of

---

makes the mandate's effectiveness conditional on actually issuing the referenced appropriation. See 2 U.S.C. § 658d(a)(2)(A)–(B) (2006); Garrett, *Enhancing*, *supra* note 13, at 1161–62; Garrett, *Federalism*, *supra* note 13, at 1501.

<sup>357</sup> See Adler, *supra* note 344, at 1152–53 (noting, despite his claim that UMRA's procedural obstacles are not strong enough, that they are formidable "roadblocks"); Garrett, *Enhancing*, *supra* note 13, at 1163–67 (discussing benefits of UMRA points of order); Garrett, *Federalism*, *supra* note 13, at 1501–02. Since they can be waived, points of order are not decisive enforcement mechanisms. See Frickey & Smith, *supra* note 130, at 1738.

<sup>358</sup> Generally, congressional precedent permits members of the House to raise constitutional objections during floor consideration, even if they were not raised in committee. See Fisher, *Interpretation*, *supra* note 124, at 719; Garrett & Vermeule, *supra* note 91, at 1328. But more and more in recent years, special rules for floor consideration of major legislation have barred members from raising constitutional objections—or, sometimes, any other objections—in the House. See Garrett & Vermeule, *supra* note 91, at 1300; Sinclair, *supra* note 103, at 303–05.

<sup>359</sup> See Sinclair, *supra* note 103, at 305. Eskridge argues, however, that this and other "unorthodox lawmaking" techniques do not bypass most of the vetogates that facilitate constitutional deliberation in Congress, even if they do bypass a few. See Eskridge, *supra* note 12, at 1448.

<sup>360</sup> See Garrett, *Federalism*, *supra* note 13, at 1503–04.

<sup>361</sup> 2 U.S.C. § 658e (2006). As Garrett notes, this UMRA provision is particularly important because the House Rules Committee typically does issue special rules peremptorily waiving most points of order against budget-related proposals. Garrett, *Federalism*, *supra* note 13, at 1502.

mandate issues that might otherwise go unnoticed among the slew of proposals often bundled together in such bills.<sup>362</sup>

The important thing to note for our purposes is that UMRA's procedural enhancements apply to some preemptive legislative proposals because "[i]n its mandate statements for bills, CBO identifies explicit preemptions as intergovernmental mandates."<sup>363</sup> As the CBO explains in a report on on preemption:

When reviewing legislation, CBO identifies any language that clearly demonstrates an intention to preempt conflicting state or local laws as a mandate. UMRA defines a mandate, in part, as any provision in legislation, statute, or regulation that would impose an 'enforceable duty' on state, local, or tribal governments. Although the term preemption is not found in UMRA, CBO interprets 'mandate' to encompass both positive and negative duties; that is, a mandate may take the form of a prohibition on state and local governments.<sup>364</sup>

Though the CBO limits itself to analyzing express preemption provisions, and other provisions that it determines "clearly demonstrate[s] an intention" to preempt, and does not attempt to identify legislation that might be found to impliedly preempt state law, analysis of preemptive legislation nevertheless constitutes a significant part of CBO's UMRA workload—between 1996 and 2005, "about half of the intergovernmental mandates that CBO identified were . . . preemptions."<sup>365</sup> In the 106th Congress, for example, CBO transmitted to Congress 158 mandate statements identifying

---

<sup>362</sup> See Garrett, *Enhancing*, *supra* note 13, at 1163; Garrett, *Federalism*, *supra* note 13, at 1503–04.

<sup>363</sup> CONG. BUDGET OFFICE, *Summary to PREEMPTIONS IN FEDERAL LEGISLATION IN THE 106TH CONGRESS* Summary (2001), available at <http://www.cbo.gov/ftpdocs/28xx/doc2885/Preemptions.pdf> (last viewed Aug. 16, 2009) [hereinafter CBO, PREEMPTIONS]; see also Cong. Budget Office, Testimony Before the United States Senate Committee on Homeland Security and Governmental Affairs, Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Statement of Deputy Dir. Elizabeth Robinson, A Review of CBO's Activities Under the Unfunded Mandates Reform Act, at 5 (Apr. 14, 2005), available at [http://www.cbo.gov/ftpdocs/62xx/doc6275/04-14-UMRA\\_testimony.pdf](http://www.cbo.gov/ftpdocs/62xx/doc6275/04-14-UMRA_testimony.pdf) (last viewed Aug. 16, 2009) [hereinafter 2005 CBO Testimony] (noting that in discharging its analytical responsibilities under the UMRA, "CBO identifies explicit preemptions of state law as intergovernmental mandates").

<sup>364</sup> CBO, PREEMPTIONS, *supra* note 363, at 3.

<sup>365</sup> 2005 CBO Testimony, *supra* note 363, at 5. On CBO's exclusion of implied preemption, see CBO, PREEMPTIONS, *supra* note 363, at Summary ("In cases where a preemption is not stated explicitly, CBO is not in a position to identify an implied preemption as a mandate, often because it is not clear that the law would be a preemption until well after enactment.").

mandates in legislative proposals; 80 of the identified mandates were preemptions according to CBO's definition.<sup>366</sup>

CBO often concludes that the costs of preemptive provisions will fall below the \$50 million statutory threshold for the substantive point of order, but not always.<sup>367</sup> Regardless of its cost estimate, the CBO routinely identifies these preemptive provisions in mandate statements, bringing them to the attention of the authorizing committee and, by inclusion of the mandate statement in the committee report, to the floor.<sup>368</sup> In this way, UMRA increases both the visibility of preemptive legislative proposals in Congress and the substantive information available to members of Congress about them. Even if a provision is not costly enough to trigger a substantive point of order, UMRA's effect of increasing congressional attention to mandates and preemptive provisions has important upstream effects: CBO analysts often work with congressional staff to draft legislation that will not violate UMRA's restrictions and "[o]bservers generally believe that UMRA has the most influence before a bill reaches the floor as drafters work to avoid its provisions."<sup>369</sup> And Congress's acceptance of CBO's interpretation of the UMRA reporting requirement to include preemption in this way, for nearly a decade, suggests approval.

Thus, as Garrett observes, UMRA's effects of "produc[ing] more information about intergovernmental mandates for members of Congress and ensur[ing] that the information plays a role in congressional decisionmaking" add additional obstacles to the process of enacting legislation containing mandates and thus generally makes such legislation more difficult to enact than ordinary legislation.<sup>370</sup> And UMRA is considered a success—so much so that there have been several proposals to expand its coverage beyond unfunded mandates.<sup>371</sup> Consistent with the qualifications to the idea of congressional constitutional deliberation that we drew from our examination

---

<sup>366</sup> CBO, PREEMPTIONS, *supra* note 363, at 5 tbl. 1.

<sup>367</sup> See CBO, PREEMPTIONS, *supra* note 363, at 3–4 (giving examples of legislative proposals in the 106th Congress CBO identified as containing preemptions and issued mandate reports for incomplete sentence); *id.* at Summary (reporting that no CBO-identified instances of preemption in the 106th Congress exceeded the \$50 million threshold in direct costs); 2005 CBO Testimony, *supra* note 363, at 2 (identifying two CBO-identified preemptive proposals—a "preemption of state taxes on premiums for certain prescription drug plans" and a "temporary preemption of state authority to tax certain Internet services and transactions"—that did exceed the threshold).

<sup>368</sup> See *supra* notes 348–352 and accompanying text.

<sup>369</sup> Garrett, *Federalism*, *supra* note 13, at 1505.

<sup>370</sup> See *id.* at 1500, 1508.

<sup>371</sup> See Garrett & Vermeule, *supra* note 91, at 1331 nn.156–57; 2005 CBO Testimony, *supra* note 363, at 5–6 (giving examples of proposals to expand UMRA).



of congressional constitutional capacity, we need to look briefly at some aspects of UMRA's enactment before drawing conclusions.

Federalism-related issues like preemption unfunded mandates generally are not politically salient—the arguments involved are too abstract to capture much public or congressional attention—and federalism is not consistently aligned enough with either party's ideological commitments to become a recurring Republican or Democratic issue.<sup>372</sup> But unfunded mandate reform became very politically salient in the mid-1990s, and UMRA was a featured piece of the new Republican majority's "Contract with America" legislative agenda.<sup>373</sup> The heightened political attention to the issue of unfunded mandates resulted in large part from the efforts of the intergovernmental lobby; and that makes sense because, as I have argued, intergovernmental lobby groups have particular incentives to place federalism issues on the legislative agenda.<sup>374</sup> In placing enough political pressure on Congress to make a relatively abstract federalism issue into a national priority, interest group influence in this instance may have had a more positive than negative effect on the existence and quality of congressional constitutional deliberation.

On the other hand, there can be no denying that the intergovernmental lobby's position on mandates was decidedly pro-state and thus one-sided on the relevant constitutional questions. This, combined with the observation that Congress at the time was controlled by Republicans, many of whom were ideologically aligned with the state-favoring position, probably did bias pre-enactment congressional deliberations about UMRA in favor of a state-favoring constitutional conclusion.<sup>375</sup> This might suggest that we should view UMRA as evidence of a popular policy initiative dressed up in constitutional rhetoric and not as legitimate evidence of a congressional *constitutional* determination. The first thing to note here is that the political uproar surrounding UMRA's enactment was pretty clearly about unfunded mandates, and not necessarily about preemption—UMRA's effect on preemption seems to have arisen somewhat after the fact.<sup>376</sup> UMRA therefore may have greater evidentiary value for Congress's views on the constitutional norms governing preemption than on those relevant to unfunded mandates, if the two are distinct. More importantly, the costs of enacting durable precommitment statutes, and the uncertainty about how the

---

<sup>372</sup> See Garrett, *Federalism*, *supra* note 13, at 1505; Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1301–02 (2004) (noting "something of a shift in the traditional political valence of federalism disputes").

<sup>373</sup> See Garrett, *Federalism*, *supra* note 13, at 1507.

<sup>374</sup> See *id.* at 1506–08; see also *supra* Part III.C.

<sup>375</sup> See Garrett, *Federalism*, *supra* note 13, at 1507.

<sup>376</sup> See *id.*

rules will apply in the future, places pressure on legislators to draft relatively neutral rules and also obviates the concern about UMRA being nothing more than a response to interest group pressure, at least in large part.<sup>377</sup>

Another important offsetting factor is the observation that UMRA is still in effect—several subsequent Congresses, including those controlled by Democratic majorities, have had the opportunity to weaken or repeal UMRA and have not done so. It has stood the test of at least some time.<sup>378</sup> This seems to suggest that Congress thinks UMRA gets the relevant issues right. But UMRA's longevity also may be due in part to the inherent difficulty of changing or repealing an existing statute.<sup>379</sup> This inertial quality of enacted statutes, Garrett explains, is one reason that an existing majority might choose to enact a framework statute—enactment will have at least some binding effect on future, ideologically distinct majorities because of legislative inertia.<sup>380</sup> However, inertia is less of a hurdle to altering UMRA's requirements; the House, Senate, and Congress as a whole can change the UMRA requirements in the same way they may change internal procedural rules.<sup>381</sup> So, for example, rules that apply to both the House and Senate may be altered by a concurrent resolution, which is easier to pass than a formal statute.<sup>382</sup> The involvement of the intergovernmental lobby also may provide part of the explanation for UMRA's survival, if those groups are invested enough in the continuing existence of UMRA to monitor attempts to change or repeal the statute and punish members who make such attempts.<sup>383</sup> Finally, UMRA has not remained utterly unchanged since its enactment: In 2005, the Congress strengthened UMRA in the Senate by requiring sixty votes to waive a UMRA point of order; but the next Congress allowed the rule to revert to the default requirement of a simple majority for waiver.<sup>384</sup>

These considerations give us a somewhat blurry picture of UMRA's evidentiary value, but I think that our concerns should be alleviated, at least in large part, by UMRA's coherence with a larger, ongoing historical pattern

---

<sup>377</sup> See *supra* notes 308–317 and accompanying text.

<sup>378</sup> See *supra* notes 298–304 and accompanying text.

<sup>379</sup> See Garrett, *Purposes*, *supra* note 13, at 750–53; Gersen & Posner, *supra* note 123, at 593–94; *supra* note 269.

<sup>380</sup> See Garrett, *Purposes*, *supra* note 13, at 752–53.

<sup>381</sup> See 2 U.S.C. § 1515(2) (2006); Garrett, *Federalism*, *supra* note 13, at 1519.

<sup>382</sup> See Garrett, *Federalism*, *supra* note 13, at 1502 (discussing UMRA rule change by concurrent resolution).

<sup>383</sup> See *id.* at 1518.

<sup>384</sup> S. Con. Res. 21, 110th Cong. § 205 (2007); H.R. Rep. No. 110-153, at 16 (2007) (allowing requirement to revert to simple majority despite initial Senate vote to extend sixty-vote requirement to 2017) (as cited in Garrett, *Federalism*, *supra* note 13, at 1502, 1502 nn.46, 49); H.R. Con. Res. 95, 109th Cong. § 403, 119 Stat. 3633, 3652 (2005) (increasing Senate requirement to sixty votes).

of congressional action on mandates and similar issues. In 1959, Congress enacted a statute creating the Advisory Commission on Intergovernmental Relations (ACIR), “a permanent, bipartisan” independent federal agency with members drawn from the national Executive, Congress, and state and local governments.<sup>385</sup> ACIR had several broad advisory purposes, including assisting in reviewing proposed legislation to assess federalism impacts and, relating to preemption, “recommend[ing], within the framework of the Constitution, the most desirable allocation of governmental functions, responsibilities, and revenues among the several levels of government.”<sup>386</sup> ACIR had no rulemaking authority; its role was informational: it studied intergovernmental-relations issues and provided briefings and testimony to the Executive, Congress, and sub-national governments as well as reports on specific issues and a mandatory annual report on intergovernmental issues.<sup>387</sup> Before its termination in 1996, ACIR published over 300 reports, including some exclusively focused on preemption.<sup>388</sup> Among other things, ACIR was one of the entities pressuring Congress to enact the UMRA.<sup>389</sup> Though it was terminated in 1996—likely as one of several small agency casualties of the struggle to balance the federal budget—ACIR’s information-generating capacity was by that time largely redundant with the CBO’s newly-created UMRA staff and other entities.<sup>390</sup> Thus Congress had already acted to increase its informational resources for considering legislation impacting the relative regulatory authority of the national and state governments, including preemption, several decades before enacting UMRA.

In 1981, Congress enacted a precursor statute designed to increase Congress’s awareness of and information about intergovernmental mandates issues in particular: The State and Local Cost Estimates Act of 1981 was similar to UMRA in requiring the CBO to monitor legislative proposals for the presence of mandates, alert Congress when it found them, and provide

---

<sup>385</sup> See Act of Sept. 24, 1959, Pub. L. No. 86-380, 73 Stat. 703, 703–04 §§ 1, 3.

<sup>386</sup> *Id.* § 2, 73 Stat. at 704.

<sup>387</sup> See 5 C.F.R. § 1701.8 (1987) (stating that ACIR’s primary role is to provide information and describing ACIR’s activities); 5 C.F.R. § 1701.10 (1987) (ACIR’s activities include briefings and testimony in federal agencies, Congress, state governments, local governments, and private settings); 5 C.F.R. § 1702.4 (1986) (annual report requirement).

<sup>388</sup> See Bruce D. McDowell, *Advisory Commission on Intergovernmental Relations in 1996: The End of an Era*, 27 PUBLIUS: THE JOURNAL OF FEDERALISM 111, 112 (1997) (discussing ACIR’s reporting work over its history); *id.* at 113–14 (noting ACIR’s shift to emphasizing preemption and other issues relating to “regulatory federalism” in the 1980s and 1990s); see, e.g., Advisory Commission on Intergovernmental Relations, *Federal Preemption of State and Local Authority: History, Inventory, and Issues* (1992).

<sup>389</sup> McDowell, *supra* note 388, at 114.

<sup>390</sup> See *id.* (discussing termination of ACIR); *id.* at 121–22 (speculating on the reasons why ACIR was terminated).

cost estimates for mandates exceeding a threshold.<sup>391</sup> It differed in setting the statutory threshold for detailed cost estimates at \$200 million, and it did not contain UMRA's point of order enforcement mechanisms.<sup>392</sup> But once again, Congress appears to have been working to increase the frequency with which it would be alerted to issues potentially affecting state governments and the volume and quality of substantive information available to members for deliberating about those issues once raised. Increasing congressional awareness of and knowledge about certain kinds of concerns increases the potential for objection, debate, and deliberative decision making about them. This pattern also is reflected—specifically as it relates to preemption—in some past and present legislative proposals and other congressional actions short of enacted statutes.

Several 1999 proposals would have changed the way preemptive legislation proceeds through Congress. The Federalism Act would have been a relatively detailed framework statute designed to do for preemption what UMRA does for mandates: committees would be required to identify any preemptive provisions in proposed legislation; the CBO then would prepare a statement describing the legislation's preemptive effect and its costs on state governments; and the committee would include the CBO statement in its report, along with specific identification of the preemptive provisions and a statement of the constitutional basis for preemption in each instance.<sup>393</sup> Rather than enforcement by point of order, the proposal directed courts in preemption cases to hold state law preempted only where there was express statutory preemption language or direct conflict.<sup>394</sup> The Federalism Accountability Act and the Federalism Preservation Act (FPA) were designed to increase congressional control over the extent to which federal administrative agencies' actions and statutory interpretations would result in preemption. The FPA would have required agencies to assess and report their conclusions about their contemplated preemptive actions' impacts on state governments—a requirement already imposed by executive order, but which agencies have generally failed to satisfy.<sup>395</sup> The Federalism Accountability

---

<sup>391</sup> State and Local Cost Estimate Act of 1981, Pub. L. No. 97-108, 95 Stat. 1510; see Adler, *supra* note 344, at 1152.

<sup>392</sup> See 2 U.S.C. § 653 (1988); Adler, *supra* note 344, at 1152 n.54.

<sup>393</sup> See Federalism Act of 1999, H.R. 2245, 106th Cong. § 8(b)(1)–(2) (1999); see also Garrett, *Federalism*, *supra* note 13, at 1528–29.

<sup>394</sup> See H.R. 2245 § 9(a); Garrett, *Federalism*, *supra* note 13, at 1529.

<sup>395</sup> See Federalism Preservation Act of 1999, H.R. 2960, 106th Cong. (1999); Patricia L. Donze, *Legislating Comity: Can Congress Enforce Federalism Constraints Through Restrictions on Preemption Doctrine?*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 239, 268 (2000–2001) (describing the FPA); see also Exec. Order No. 12,612 (Reagan's "federalism assessment" order to agencies); Exec. Order No. 13,132 (Clinton's reissued version of Reagan's executive order; similar requirements); Donze, *supra*, at 269 ("Of the

Act would have required congressional committees to state whether statutes preempt state laws to provide clearer guidance to agencies and would have required agencies to provide a formal statement of the reasons for taking any preemptive action.<sup>396</sup> A similar bill focused on administrative agencies' preemptive actions was proposed, but never actually introduced, in 2007.<sup>397</sup> These kinds of actions—what Gersen and Posner call “soft law”—are less costly to take, and thus their evidentiary value is diminished; but again, they do provide some information and they may in fact provide a better representation of purely congressional views.<sup>398</sup> And their consistency with the pattern of enacted statutes seems to lend further credibility.

The coherence of Congress's pattern of action since establishing the ACIR in the late 1950s, through UMRA's success and up to current suggestions to broaden UMRA and enact framework legislation to govern preemption and other issues that impact the interests of state governments, suggests that the heightened procedural requirements for many forms of preemption affected by UMRA are not just the fleeting whim of a pro-state majority. Rather, they seem to tell us something important about Congress's view of what the relevant constitutional norms require. They indicate that Congress has been concerned for decades to increase, above the baseline, its capacity for systematic and informed deliberation about legislative proposals that may substantially impact state interests, including the state interest in retaining meaningful regulatory authority that is affected by preemption. And, as I have explained, increasing the visibility of constitutional issues and the information that members of Congress have about them in turn increases the likelihood that meaningful deliberation about constitutional issues will occur during consideration of legislative proposals that trigger the heightened procedural requirements. In other words, all these statutes and legislative proposals suggest that Congress has been consistently concerned to “make more arduous the path of enacting certain laws that pose a particular threat to federalism.”<sup>399</sup>

---

11,414 final rules issued by federal agencies between April 1, 1996 and December 31, 1998, only *five* indicated completion of a federalism assessment”); Mendelson, *supra* note 12, at 783 (similar); Sharkey, *supra* note 243, at 2139–40 (presenting an empirical case that agency compliance with the federalism impact assessment requirements has been not only relatively rare, but “of poor quality”).

<sup>396</sup> See S. 1214, 106th Cong. §§ 5, 7 (1999); Sharkey, *supra* note 243, at 2174–75.

<sup>397</sup> See Sharkey, *supra* note 243, at 2176, 2176 nn.200–01.

<sup>398</sup> See *supra*, notes 306–317 and accompanying text; Gersen & Posner, *supra* note 123, at 594–97; cf. Sharkey, *supra* note 243, at 2174–75 (explaining that the politics of these bills' fates were “complicated”).

<sup>399</sup> Garrett, *Federalism*, *supra* note 13, at 1524.

### *C. Implications, Open Questions, and a Research Agenda*

What do UMRA and the other framework statutes and related evidence discussed in the last section tell us about Congress's understanding of the textual source and content of the constitutional norms governing preemption? One thing is relatively clear: Congress views the ordinary legislative process as insufficient for much potentially preemptive legislation.<sup>400</sup> It wants more information about the existence and effect of preemptive legislation to be made available more often, and earlier, in the legislative process; and generally for preemptive legislation to face stiffer pre-enactment hurdles than ordinary legislation.

Since constitutional federalism norms are—at least in large part—about the structure of the national legislative process, it seems natural to infer that congressional alterations to the process that increase the extent to which state interests are protected are motivated by a desire to comply with federalism requirements. We could draw several further conclusions from this. First, federalism may be primarily an external constitutional limitation on legislative power—federalism norms may bar certain congressional actions, even if otherwise constitutionally permissible, where they threaten to undermine the federal structure of government. And federalism norms also are arguably best implemented in the political process rather than by judicial review.<sup>401</sup> Since there is a strong argument that preemption does undermine the federal structure by diminishing state regulatory authority,<sup>402</sup> it makes sense to think of framework laws designed to make preemptive legislation more difficult to enact as Congress's attempts to observe federalism-based limitations on its legislative power. While this view of the evidence does not reveal what Congress thinks the constitutional source of its preemptive authority to be, it does suggest that, whatever its source, Congress may not think that the power is entirely without constitutional constraint.

But second, the process-orientation of the evidence and the natural inference from that to the relevance of federalism also are consistent with the conclusion that Congress believes federalism norms to be the constitutional norms that authorize preemption. This reading of the evidence is quite a bit more interesting. It is not obvious how structural constitutional norms like

---

<sup>400</sup> See *id.* at 1508; Garrett & Vermeule, *supra* note 91, at 1299. The existence of framework statutes on issues like preemption and unfunded federal mandates casts doubt on claims that Congress will be less attentive to constitutional norms where the standards of judicial review are deferential. See PICKERILL, *supra* note 121, at 126–28; see also *supra*, notes 223–224 and accompanying text.

<sup>401</sup> See, e.g., Stuart M. Benjamin & Ernest A. Young, *Tennis with the Net Down: Administrative Federalism Without Congress*, 57 DUKE L.J. 2111, 2143 (2008); see generally Clark, *supra* note 43.

<sup>402</sup> See *supra* Part IV.A.

federalism could empower anyone to do anything; and I have argued elsewhere that at least a *plenary* congressional power of preemption is not a necessary condition for a functioning federal governmental structure.<sup>403</sup> Nevertheless, it is true that federalism is in principle as much about guaranteeing effective national government authority as it is about protecting state governments from national overreaching.<sup>404</sup> National power to preempt state law and regulatory authority may—like the presumption against preemption—be derived by implication from federalism’s underlying values.<sup>405</sup> Thus Congress’s preemptive authority may be a product of our federalism norms as they have been developed over time. If that is so, then the additional procedural obstacles to preemption embodied in statutes like UMRA may be designed to implement Congress’s understanding of internal, not external, limitations on its preemptive authority. This kind of account of preemption as an outgrowth of the development of constitutional federalism norms would solve one major puzzle about preemption: the fact that the Constitution itself has no written provision that obviously confers on Congress the power to displace state law and state regulatory authority.<sup>406</sup> Preemption’s constitutional authorizing norm, on this view, would be one of the species of “extraconical” constitutional norms that Ackerman, Eskridge, Ferejohn, Young, and other modern constitutional theorists claim arise as political and institutional conflicts are resolved over time.<sup>407</sup>

No interpretation of this framework evidence will give us the entire story on the constitutional norms that authorize Congress’s preemption of state law and regulatory authority. It seems that we can say Congress recognizes that when it comes to preemptive legislation, the process of enactment *matters*. But that does not decisively prove or disprove any account of the constitutional source of Congress’s preemptive authority—the Supremacy Clause account, the Necessary and Proper Clause account, the Enumerated Powers account, or the Federalism account.<sup>408</sup> Congress’s choice to impose additional burdens on the proponents of preemptive legislation could be based on prudential reasons rather than constitutional limitations on congressional power; thus Congress’s actions may be consistent with any of preemption’s proffered constitutional sources. Or, the additional process requirements imposed by framework laws like UMRA may constitute Congress’s recognition of a substantive limitation on a preemptive authority

---

<sup>403</sup> See Pursley, *Structure*, *supra* note 5, at 948–49.

<sup>404</sup> See *supra* note 235 and accompanying text.

<sup>405</sup> See *supra* notes 231–233 and accompanying text.

<sup>406</sup> See *supra* notes 48–72 and accompanying text.

<sup>407</sup> See, e.g., Young, *supra* note 123, at 413. See generally BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215 (2001).

<sup>408</sup> See *supra* notes 73–76 and accompanying text.

with a distinct constitutional source. For example, if the Necessary and Proper Clause is the real, basic source of Congress's preemptive authority, then statutes like the UMRA may represent Congress's view of what must occur in the legislative process for preemption to be constitutionally "proper."<sup>409</sup>

Since the basic question of preemption's constitutional authorizing norm remains unanswered, we need to examine additional evidence of Congress's constitutional views about preemption. Indeed, if the extracanonical constitutional development idea captures something true about preemption, then, given Congress's historical control over the issue, *only* further examination of Congress's treatment of preemption—including important historical moments where the scope of national preemptive authority apparently changed—will provide a full picture of preemption's governing constitutional norms. While the examination of framework statutes does not give us an exhaustive account of Congress's thinking about the constitutional norms governing preemption, the groundwork has been laid here for additional study that may result in such an account. And the framework evidence provides an important part of the picture of Congress's views that we must have in order to eventually construct the full account. Now, our cost proxy for evidentiary value suggests that individual preemptive statutes are the logical next category of evidence to examine. I propose to do this in at least two parts, dividing up the national regulatory universe by subject. After that, consideration of non-statutory evidence—including congressional resolutions and other "soft law" relating to preemption—may add further detail to our understanding of Congress's views. Legislative inaction may be important evidence, too—even if Congress's preemptive authority has limits, it may be that describing those limits requires looking at instances in which Congress decided to reject preemption as an effect of legislation.

Even if Congress's view is coherent and can be made clear, important normative questions will remain. One is what status we should accord congressional views about the constitutional norms governing preemption. Presumably those views will not all be set out in a single statute. The question of whether congressional constitutional determinations that are not embodied in a statute may nevertheless constitute binding, valid law is a deep one that intersects with the literature on extracanonical constitutional development.<sup>410</sup> Where courts have, for constitutional or instrumental reasons, recognized Congress as holding primary interpretive authority over an issue, as they have with preemption, we will want to think carefully about whether Congress's constitutional determinations should be considered

---

<sup>409</sup> Cf. Gardbaum, *supra* note 3, at 782 (discussing the "propriety" requirement).

<sup>410</sup> See, e.g., ACKERMAN, *supra* note 407; Eskridge & Ferejohn, *supra* note 407; Young, *supra* note 123.



binding on future congresses, other branches of the national government, state governments, and citizens; and whether those determinations, if binding, should be accorded the status of “higher law” that invalidates conflicting provisions of “ordinary law.”<sup>411</sup>

A second question, and one I have discussed at length already, is whether current judicial doctrine is justified in the light of Congress’s account of preemption’s governing constitutional norms. The foregoing arguments are not intended to show that the judicial deference rule applied in preemption cases is justified. Rather, they show only that certain threshold conditions for its justification are satisfied. The picture that we have so far is mixed: while we can say that deliberative constitutional decision making in Congress occurs, it will be the exception rather than the norm and whether it is likely to occur for one issue or another will depend significantly on the particular legislative contexts in which the issue we are interested in is likely to arise.<sup>412</sup> The possibility of congressional deliberation and determinations about the constitutional norms governing preemption is a necessary but not sufficient condition for the judicial deference rule applied in preemption cases to be conceptually and constitutionally justified. More is required.

First, it may turn out that the constitutional norms governing preemption require something different. Yes, they may be perfectly consistent with deference to Congress’s determinations about when preemption is permissible and when it is not, but, since we do not yet have a full account of the norms’ content, we cannot be certain. Of course, since judicial practice has been to defer to Congress on preemption, we still have to look to congressional evidence to flesh out the answers because, well, there may be nothing else. Second, as I have mentioned, the judicial deference rule may still be unjustified if there is a strong instrumental case against it. That is, even if Congress may, as a conceptual matter, legitimately be tasked with identifying and abiding by preemption’s authorizing norm, in practice it may have systematically failed to do so, or it may have done a systematically poor job. These kinds of problems would invalidate the deference rule just as surely as a strong normative case against the legitimacy of congressional constitutional interpretation. After all, most judicial constitutional decision rules are justified by their instrumental value in implementing constitutional norms.<sup>413</sup> If the cooperative implementation anticipated by decision rules like those at work in preemption doctrine fails because the relevant non-judicial actor does not discharge its part of the task, then doctrinal revision may be required.

---

<sup>411</sup> See Young, *supra* note 123, at 413–16 (discussing this question).

<sup>412</sup> See Gerhardt, *supra* note 100, at 529.

<sup>413</sup> See LAWRENCE G. SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 86–87 (2004); *supra* Part II.C.

Evaluating the results of Congress's constitutional deliberations will be important in another sense as well. Justifying the judicial deference rule requires at least a showing that it is consistent with the congressional account; but it may also depend on whether the congressional account is a correct construction of the Constitution. Whether this is so will be determined by the nature of the constitutional norm or norms that authorize preemption. If the authorizing norm is vague enough to allow reasonable disagreement over what it requires, then judicial rules implementing Congress's interpretation are justified so long as Congress properly has interpretive authority (that is, so long as Congress's exercise of interpretive authority is either (1) constitutionally mandatory, or (2) not inconsistent with relevant constitutional norms and an instrumentally justified departure from the default of judicial authority) and Congress's interpretation is one of the reasonable choices. By contrast, if the norm admits of only one reasonable construction, then judicial rules implementing Congress's interpretation are constitutionally justified only if Congress's interpretation is correct. But evaluation of Congress's performance in implementing the constitutional norms governing preemption—comparative or otherwise—must wait until after we have seen all the evidence.<sup>414</sup>

Other questions include whether Congress is *obligated* to generate a constitutional justification for preemption; whether Congress is obligated to *announce* such a justification publicly or to the courts; and whether a congressional constitutional justification for preemption can or should be considered as *binding* on the judiciary. A related question is what, if anything, courts should do in response to Congress's views to the extent that those views suggest doctrinal change. Some argue that courts should not attempt to enforce congressional modifications to the legislative process embodied in framework statutes by converting them into doctrinal requirements.<sup>415</sup> But if Congress has modified the legislative process in the course of authoritatively construing the content of constitutional norms, judicial doctrine may provide an expedient means of entrenching congressional views against future congresses and other actors. Indeed, if Congress has interpretive authority by constitutional command, or if the courts believe that Congress's view is correct, entrenchment in judicial doctrine may be a requirement of the judicial duty to "say what the law is."<sup>416</sup>

---

<sup>414</sup> On objective versus comparative evaluation of congressional performance in constitutional interpretation, see *supra* notes 91–101 and accompanying text.

<sup>415</sup> See, e.g., Garrett, *Federalism*, *supra* note 13, at 1524–39. See generally Anita S. Krishakumar, *Representation Reinforcement: A Legislative Solution to a Legislative Process Problem*, 46 HARV. J. ON LEGIS. 1 (2009).

<sup>416</sup> See generally Eskridge & Ferejohn, *supra* note 407.

## V. CONCLUSION

I started with the ambition to clarify the constitutional basis for the national government's authority to preempt state law. Much is yet to be said—the discussion so far has raised more questions than it has answered. But in a sense that was the real point. Gaining a clear understanding of Congress's views about the constitutional norms governing preemption—or Congress's views about any constitutional norms, for that matter—is a complex task. Here, I wanted to make the case in principle that Congress as an institution is capable of forming and expressing views about the content of constitutional norms; to lay some of the theoretical groundwork for the project of identifying congressional constitutional views that relate to preemption; and to start that project with a few tantalizing examples and a preview of their implications. It will take substantially more work to get a full picture of Congress's understanding of its constitutional authority to preempt state law and state regulatory authority. And Congress is not the only actor that attempts preemption; so the full account of preemption's constitutional grounding may require analysis of evidence from federal agencies, the President, and even state governments. We now have a firmer foundation on which to proceed with further descriptive and normative work on preemption.

